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In The

Supreme Court of the United States

JOEL ESCOBAR OCHOA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
Attorney General of the United States,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether the Court of Appeals' decision in this case fails to properly apply this Court's "continuum of conduct" test set forth in *Fedorenko v. United States*, 449 U.S. 490, 514, n. 34 (1981) and is in conflict with the interpretation of that test set forth by the Second, Sixth, Seventh and Eighth Circuits.

2. Whether the Court of Appeals erred in holding that there was substantial evidence in the record to support a finding that Petitioner assisted in the persecution of others where the record does not establish that Petitioner was aware that the individuals he helped to arrest might be later tortured by other police officers and where the record establishes that after so discovering, he complained to his superiors and resigned.

3. Whether the administrative agency must specifically indicate that it is ordering a non-citizen removed in order for there to be a final order of removal over which the Courts of Appeals would have jurisdiction.

PARTIES TO THE PROCEEDING

Petitioner (Petitioner below) is Joel Escobar Ochoa. Respondent (Respondent below) is Eric H. Holder, Jr., Attorney General of the United States.

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PETITION FOR A WRIT OF CERTIORARI

Joel Escobar Ochoa respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals in Petitioner's petition for review (App. 1-4) is unpublished (case number 05-71765). The decision is reported at 340 Fed. Appx. 420 (August 10, 2009). The opinions of the Board of Immigration Appeals (App. 5) and the Immigration Judge (App. 6-18) are unpublished. The opinion of the Ninth Circuit Court of Appeals in Petitioner's petition for rehearing with suggestion for rehearing *en banc* (App. 19-20) is unpublished (case number 05-71765).

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2009. Rehearing was denied on December 16, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Reprinted in the appendix to this petition (App. 21-28) are pertinent provisions of the Immigration and Nationality Act, Pub. L. No. 111-83, 123 Stat. 2186 (Oct. 28, 2009); Section 1101(a) of Title 8, United States Code (2009); Section 1158 of Title 8, United States Code (2009); Section 1231 of Title 8, United States Code, as amended effective October 1, 2006; Section 1252 of Title 8, United States Code, as amended effective May 11, 2005; Section 208.13 and Section 1208.13 of Title 8, Code of Federal Regulations; Section 208.16 and Section 1208.16 of Title 8, Code of Federal Regulations; and Section 1240.12 of Title 8 Code of Federal Regulations.

STATEMENT OF THE CASE

Petitioner Joel Escobar Ochoa ("Petitioner") is a native and citizen of Guatemala. A.R. at 407. He entered the United States without inspection on or about October 14, 1993. A.R. at 407-09. On December 9, 1993, Petitioner filed an affirmative asylum application. A.R. at 397-401. On January 13, 1999, Petitioner was issued a Notice to Appear ("NTA") and his application was referred to the Immigration Court by the Asylum Office. A.R. at 489-90. The NTA charged Petitioner as removable pursuant to 8 U.S.C. § 1182(a)(6)(A)(i) of the Immigration and Nationality Act ("INA"), as an alien who entered the United

States without being admitted or paroled. *Id.* Petitioner conceded that he was removable as charged. He renewed his application for asylum and withholding of removal before the immigration court.

In support of his application for asylum, Petitioner testified that he voluntarily joined the police force in Guatemala in 1987. A.R. at 179. He had various assignments throughout the six years he was involved with the police, most of which involved desk jobs, as he was a strong typist. During cross examination, Petitioner was questioned extensively as to his involvement in arresting guerillas and whether he participated in the torture of detainees. A.R. at 202-13. Petitioner testified that he never tortured anyone nor was he present during any torture sessions. A.R. at 183.

Petitioner also testified that he excelled as a typist, and therefore he was assigned to work for three to four years at the National Police Hospital where his duty was to type reports to inform the chiefs of the injured police officers who had arrived at the hospital. A.R. at 205. After his work at the National Police Hospital, Petitioner testified that he was transferred to the Fourth District of Police where he first worked for approximately four months on patrol duty, and occasionally was involved in arresting individuals. A.R. at 205-06. He was then transferred to an office job within the Fourth District because of his typing skills. A.R. at 204-09. Petitioner took statements from detainees after, he believed, they had been mistreated, but before they appeared

before a judge. A.R. at 208-09. Petitioner testified that he never witnessed the torture, but could tell that the individuals from whom he was taking declarations had been mistreated. *Id.*

Petitioner also testified that he was later transferred to work with a unit called Unapu where, again, his primary duty was typing; however, on occasion, he was sent to patrol with colleagues. A.R. at 211-12.

Petitioner testified that, in response to the abusive behavior that existed within the police force, he spoke out by telling other officers that their behavior was illegal, complained to the Superior Chief of the Commissary that detainees were being tortured, and personally delivered a letter of resignation to his superiors. A.R. at 183-84, 186.

On December 3, 2003, the Immigration Judge ("IJ") denied Petitioner's applications for asylum and withholding of removal, as well as his request for voluntary departure, pursuant to 8 U.S.C. § 1229c(b). App. at 18. The IJ based her decision on her conclusion that Petitioner was ineligible for relief because he had engaged in the persecution of others pursuant to 8 U.S.C. § 208(b)(2)(A)(i) and 241(b)(3)(B). Petitioner filed a timely appeal of the IJ's decision to the Board of Immigration Appeals ("BIA" or "Board"). On February 28, 2005, the Board affirmed without opinion the decision of the Immigration Judge. App. at 5. On March 29, 2005, Petitioner, through prior counsel, filed a timely petition for review with the Ninth Circuit Court.

On May 27, 2005, Petitioner filed a Motion to Reopen with the Board. A.R. at 66-119. On July 26, 2005, the Board denied Petitioner's Motion to Reopen. A.R. at 59-60. On August 23, 2005, Petitioner filed a Motion to Reconsider the Board's denial of his Motion to Reopen. A.R. at 8-58. The Board denied Petitioner's Motion to Reconsider on October 28, 2005. A.R. at 1-2.[1] Petitioner timely filed a petition for review of the Board's decisions with this Court. All petitions for review were consolidated.

A Ninth Circuit panel dismissed Petitioner's consolidated petition for review on August 10, 2009. App. at 1-4. On September 15, 2009, undersigned counsel entered her appearance before the Ninth Circuit. On November 5, 2009, Petitioner timely filed a petition for panel rehearing with suggestion for rehearing *en banc*. On December 16, 2009, the Court denied Petitioner's petition for rehearing. App. at 19-20. On January 8, 2010, the Court granted Petitioner's motion for stay of mandate pending the filing of a petition for writ of certiorari.

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[1] Petitioner's Motion to Reopen and Motion to Reconsider pertained to his request for voluntary departure as well as a petition his United States citizen spouse filed on his behalf, and were unrelated to his application for asylum. Accordingly, they are not relevant to the instant petition.

REASONS FOR GRANTING THE PETITION

A Ninth Circuit panel denied Petitioner's appeal on the merits and held that Petitioner was barred from receiving asylum or withholding of removal because substantial evidence supported the IJ's decision that Petitioner assisted in the persecution of others in his role as a Guatemalan police officer. *See* App. at 1-4. However, the Panel erred when it held that substantial evidence supported its finding because the Panel's conclusion that Petitioner assisted in the persecution of others when he recorded the statements of detainees after they had been tortured is in conflict with the Ninth Circuit's own precedent and with that of other circuit courts (*See* Section I, *infra*), and because there is no evidence in the record that Petitioner arrested individuals knowing they might be tortured by other police officers, and once he discovered individuals were tortured after arrest, he complained to superiors and terminated his involvement in such activities by resigning. *See* Section II, *infra*. Finally, the Panel erred by issuing a ruling on the petition for review where there was never a final order of removal. *See* Section III, *infra*.

I. The Circuits Are Split As To When The Persecutor Bar Applies, And The Ninth Circuit's Decision Is In Conflict With This Court's Opinion In *Fedorenko* And With Other Circuit Court Decisions

The Ninth Circuit's decision that the persecutor bar applies in Petitioner's case is in conflict with its

own precedent as well as with precedent of other Courts of Appeals. Petitioner performed two primary functions, that are relevant to this inquiry, during his time as a police officer in Guatemala: 1) patrolling and making arrests and 2) typing statements of detainees after they were tortured and before they appeared before a judge. The persecutor bar does not apply to Petitioner when considering his role as an arresting officer because there is no evidence in the record that Petitioner arrested individuals knowing they might be tortured by other police officers (*See* Section II, *infra*), and once he became aware of the abuses, he complained to his superiors and ceased his duties in that unit of the police force.

A. The Ninth Circuit Has Applied This Court's Opinion In *Fedorenko* Inconsistently

The panel's conclusion that Petitioner assisted in the persecution of others when he recorded the statements of detainees who had been tortured, some of whom were guerrillas, is contrary to the precedent of the Ninth Circuit. App. at 1-4. Similarly, the panel's conclusion that Petitioner assisted in the persecution of others due to his involvement in arresting individuals who may have been tortured is contrary to Ninth Circuit precedent, as his actions did not constitute involvement in persecution. *See* Section II *infra*. The Ninth Circuit's decision in *Miranda Alvarado v. Gonzales*, 449 F.3d 915, 926 (9th Cir. 2005), is the sole authority cited by the panel in reaching its conclusion,

yet *Miranda Alvarado* is distinguishable from the instant case. *See* App. at 1-4.

In determining whether the persecutor bar applies, individual accountability must be established. *Miranda Alvarado*, 449 F.3d at 926. To determine personal culpability, the Court must evaluate the applicant's actions against the continuum of conduct between "[a]n individual who did no more than cut the hair of female inmates before they were executed" and a guard who admitted to shooting at escaping inmates. *Id.* at 925-26 (quoting *Fedorenko v. United States*, 449 U.S. at 512 n.34). In determining where one's actions lie on this continuum, the adjudicator must "examin[e] the degree of relation his acts had to the persecution." *Id.*

In interpreting the *Fedorenko* continuum, the Ninth Circuit concluded in *Miranda Alvarado* that the petitioner, who interpreted during the interrogation and torture of Shining Path members, assisted in the persecution of others. *Miranda Alvarado*, 449 F.3d at 929-30. In assessing where the petitioner's actions fell on the *Fedorenko* continuum, the Court concluded that he had performed "an integral role in facilitating the persecution." *Id.* at 928. The Court found his assistance to be material because "[w]ithout the translation, there would have been no reason for the torture to occur as it did, as its point was to elicit information." *Id.* Because his acts as an interpreter furthered the persecution, the Court found that he had assisted in the persecution of others. *Id.* at 929. Significantly, the Court held that Miranda Alvarado's

case was "perhaps at the margin of culpability required under the statute." *Id.*

As *Miranda Alvarado* stands at the margin of culpability, the present case falls squarely outside, as Petitioner's actions, wherein he merely took statements of individuals after they were mistreated, were not integral to or in furtherance of persecution. Unlike Miranda Alvarado, Petitioner in the present case was not "present and active" during the alleged persecution. A.R. at 208-09; *cf. Miranda Alvarado*, 449 F.3d at 928. Rather, he testified that he was *never* present during any torture sessions, but spoke with the detainees *afterward* to take their statements. A.R. at 208-09. Because the torture had already ended before any actions were taken by Petitioner, he did not further the persecution in any way, nor were his actions essential to the persecution. Whereas the torture would not have been able to continue without the interpreter's involvement in *Miranda Alvarado*, the torture here took place without Petitioner's involvement.

By analogizing the instant case to the facts of *Miranda Alvarado*, *supra*, as well as *Fedorenko*, *supra*, the Ninth Circuit panel appeared to struggle with the proper interpretation of the "continuum of conduct" test as the panel's decision in Petitioner's case is inconsistent with its findings in *Miranda Alvarado*, as set forth above. Petitioner's acts of recording the statements of detainees should not bar him from asylum, as he typed the statements of detainees *after* they were tortured by officers outside

of Petitioner's presence, and his recording of these statements was not integral to or in furtherance of the persecution. *Cf. Miranda Alvarado*, 449 F.3d at 927-29; *see also Weng v. Holder*, 562 F.3d 510, 515 (2nd Cir. 2009) (finding that providing *post-surgical care* to victims of forced abortions and sitting outside a locked door behind which patients were required to wait for forced abortions did not qualify as assistance in persecution).

Because the present case clearly falls on the other end of the continuum of culpability from the facts in *Miranda Alvarado*, the Ninth Circuit's conclusion that Petitioner's recording of statements of detainees constituted assistance in the persecution of others is contrary to its own precedent.[2] Wherein the Ninth Circuit is inconsistently applying the *Fedorenko* "continuum of conduct" test, further clarification of the standard for the test is needed from this Court.

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[2] Even if the Ninth Circuit court could uphold the agency's persecutor of others finding on the basis of Petitioner's having recorded the statements of detainees, its conclusion that a nexus existed between the alleged persecution and a protected ground is contrary to the Court's precedent in *Miranda Alvarado*. *See* App. at 1-4. "Persecution" must be on account of race, religion, nationality, political opinion, or membership in a particular social group. 8 U.S.C. § 1101(a)(42). A nexus between the persecutory acts and the protected ground exists only when the alleged persecutor was motivated to persecute his or her victim because he or she was believed to possess the protected ground. *Elias-Zacarias*, 502 U.S. at 481-82; *Sangha v. INS*, 103 F.3d 1482, 1486-87 (9th Cir. 1997).

B. The Circuit Courts Are Applying The *Fedorenko* Continuum Of Conduct Test Inconsistently And Require Clarification From This Court

The Ninth Circuit panel's decision upholding the agency's persecutor of others finding, despite the lack of evidence in the record that Petitioner substantially contributed to the abuse or torture of any guerillas or other individuals detained by the police, is in conflict with Ninth Circuit precedent and with that of other circuit courts. *See Miranda Alvarado*, 449 F.3d at 927, 930-32; *Compare Yan Yan Lin v. Holder*, 584 F.3d 75, 80 (2nd Cir. 2009) (holding that "[w]here the conduct [is] tangential to the acts of oppression and passive in nature, however, we decline[ ] to hold that it amount[s] to such assistance." *citing Xie v. INS*, 434 F.3d 136, 143 (2nd Cir. 2006)); *Weng v. Holder*, 562 F.3d 510, 515 (2nd Cir. 2009) (finding that post-surgical care after a forced abortion did not contribute to, or facilitate, the victims' forced abortions in any "direct" or "active" way. Her conduct neither caused the abortions, nor made it easier or more likely that they would occur. These actions were, at most, "tangential," "passive accommodation" of the conduct of others, and thus they do not trigger the persecutor bar).

In light of the differing interpretations among the circuits, and as demonstrated by the panel's decision in the instant case, the *Fedorenko* "continuum of conduct" test needs further clarification by its author. It is apparent that the circuit courts are struggling to

properly interpret *Fedorenko*, and are unable to interpret the decision in a consistent manner. For example, the Second Circuit Court of Appeals' decision in *Yan Yan Lin* illustrates the muddled state of the "continuum of conduct" test. The court, citing to its prior decision in Weng, 562 F.3d at 515, asserted that,

> [i]n deciding whether Weng had provided 'assistance' in persecution, we observed that the Supreme Court, deciding the same question, had easily distinguished between the conduct of a concentration camp barber who did not assist persecution and that of armed guards who did. (citing *Fedorenko v. United States*, 449 U.S. 490, 512 n. 34, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981)). Nevertheless, the case law offered scant guidance on how to classify less overtly culpable conduct.

Yan Yan Lin, 584 F.3d at 81 (internal citations omitted). Thus, the Second Circuit, in *Yan Yan Lin*, acknowledged that, while *Fedorenko* defined a test, the court continued to struggle with the interpretation of that test when assessing whether an asylum applicant is barred from relief pursuant to the persecutor bar.

The Eighth Circuit Court of Appeals' decision in *Hernandez v. Rio*, 258 F.3d 806 (8th Cir. 2001) further illustrates the circuits' inconsistent approach in interpreting the *Fedorenko* "continuum of conduct" test and demonstrates the difficulty decision-makers have in applying the test. In contrast to the instant case, in *Hernandez*, the Eighth Circuit reversed the Board's

determination that an alien's behavior (where the alien followed orders to remove Guatemalan villagers from their homes, herded them to the town center, and participated in a firing squad by firing to the side of those who were identified as informants and were ultimately killed) was "'adequate to indicate' that he had assisted in persecution." *Hernandez*, 258 F.3d 806, 809, 814-15. Thus, the Eighth Circuit's reversal in *Hernandez*, where Hernandez participated in a firing squad in which people were killed, is in stark contrast to the Ninth Circuit's dismissal of Petitioner's petition for review of the agency's decision in the instant case, where Petitioner's primary duties with the Guatemalan police involved typing reports and, for a short time, before knowing of the torture detainees suffered, making arrests.

In *Hernandez*, the panel majority found that the Board had failed to fully analyze the record in accordance with *Fedorenko*, and therefore vacated the Board's decision and remanded it for the Board to conduct a full *Fedorenko* analysis. *Id.* at 815. The majority also determined that had the record been "analyzed in accordance with the Fedorenko legal standard, Hernandez may be seen to have met his burden of proving that he *did not assist or participate in the persecution of others*." *Id.* (emphasis added). On the contrary, the dissenting opinion found that the Board properly applied the law, fully analyzed the record in accordance with *Fedorenko*, and believed that the Board's decision should have been affirmed. *Id.* The differing opinions within the panel show the

difficulty experienced in interpreting the test, as the majority indicated that it believed the evidence may have been sufficient to show that Hernandez was not subject to the persecutor bar, whereas the dissent believed that he was.

In the Seventh Circuit, in *Doe v. Gonzales*, the court found that "the question of whether Doe 'assisted' or otherwise 'participated' in the persecution of the Jesuits who were killed is a close question." *Doe v. Gonzales*, 484 F.3d 445, 448 (7th Cir. 2007) (where Doe was a former Lieutenant in El Salvador's army who, in 1989, expressed misgivings but complied with an order to accompany the Atlacatl Battalion in its mission to kill a Jesuit university president and who, after the mission resulted in the murder of six Jesuits, returned to the base and assisted in destroying log books identifying the soldiers who had participated in the raid). Although the facts clearly demonstrate that Doe accompanied the Atlacatl Battalion (which in 1981 had massacred the entire population, more than 200 in all, of the village of El Mozote) with the specific purpose of killing the Jesuit university president and then later destroyed evidence of the killings, the Court found that Doe's mere presence did not seem like assistance in the persecution. *Id.* at 446, 448. To support its conclusion, the Court, citing to the *Fedorenko* continuum test, stated,

> Doe's case is closer to that of 'an individual who did no more than cut the hair of female inmates before they were executed,' which

> the Supreme Court said in *Fedorenko* 'cannot be found to have assisted in the persecution of civilians,' 449 U.S. at 514 n. 34, 101 S.Ct. 737. Or to that of the petitioner in *Hernandez v. Reno*, 258 F.3d 806 (8th Cir.2001), who, forced to be a member of a firing squad, fired to one side of the target, and was held not to have assisted in persecution.

Doe v. Gonzales, 484 F.3d 445, 448 (7th Cir. 2007).

In *Diaz-Zanatta v. Holder*, the Sixth Circuit Court of Appeals granted petitioner's petition for review and vacated the order and decisions of the IJ and BIA, where the IJ denied Diaz-Zanatta's applications for asylum and withholding of removal and found that Diaz-Zanatta had "assisted or otherwise participated [in persecution] by writing the reports or by transcribing the verbatim conversations that she heard and by sending them up the chain of command." *Diaz-Zanatta v. Holder*, 558 F.3d 450, 454, 460 (6th Cir. 2009). In its opinion, the Sixth Circuit stated that,

> The government contends that the meaning of the statutory language 'assisted, or otherwise participated in the persecution,' as written in 8 U.S.C. §§ 1158 and 1231, is plain and unambiguous, and, in any event, is controlled by *Fedorenko v. United States*, 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981), a case involving these terms in a different statute and in the context of the denaturalization of an individual who had been a guard at a Nazi concentration camp.

> We disagree with the government's view, and conclude that the legal analysis of these terms when applied to an alien who is accused of having 'assisted or participated in persecution' in the context of working for a legitimate arm of a recognized government differs materially from that analysis when applied to an alien who served as a Nazi concentration camp guard. Because we further conclude that in applying the persecution bar to Diaz-Zanatta, the IJ erred as a matter of law by failing to conduct the appropriate analysis and make the necessary findings of fact, we will remand the case for further proceedings.

Diaz-Zanatta, 558 F.3d at 452. Further, the Court held,

> To apply the persecution bar to deny Diaz-Zanatta asylum or withholding of removal, the IJ must determine from the evidence in the record that during her employment with the Peruvian intelligence service, Diaz-Zanatta supplied information to the military that was actually used to persecute some individual or individuals, and that Diaz-Zanatta knew that the information she supplied would be used or was being used to persecute those individuals. It is not enough that information collected by Diaz-Zanatta and relayed by her to the SIE was used to persecute individuals if Diaz-Zanatta had no prior or contemporaneous knowledge of that; neither is it enough that Diaz-Zanatta knew that persecutions were taking place, if

> information Diaz Zanatta collected and relayed to the military was not used in those persecutions.

Diaz-Zanatta, 558 F.3d at 460. In its analysis, the Court looked to the Seventh Circuit opinion in *Singh v. Gonzales*, which distinguished work for legitimate government organizations that did not exclusively engage in persecution from work at Nazi concentration camps, whose complete existence was premised on persecution. *Diaz-Zanatta*, 558 F.3d at 455 (citing *Singh v. Gonzales*, 417 F.3d 736 (7th Cir. 2005) (where Singh worked for a local police department in Punjab, India, became a "head constable," managed other constables, and performed customary police duties including patrolling, interrogating, investigating, preparing reports, and taking people into custody).

Finally, in the Ninth Circuit's decision in *Miranda Alvarado*, the case that the panel relied on in Petitioner's case, the court found that an interpreter, who interpreted during torture sessions over a period of six years, and who failed to ever complain to his superiors about the treatment of the torture victims, and who did nothing to prevent the torture, was at "the margin of culpability." *Miranda Alvarado*, 449 F.3d at 918, 929. In that case, the Ninth Circuit utilized the *Fedorenko* test and found that although he was not a superior nor did he administer the torturous acts, Miranda Alvarado was integral to the persecution as he acted as the interpreter while individuals were tortured. *Id.* at 929. That the Ninth Circuit found Miranda Alvarado's behavior to be on

the "margin of culpability" further demonstrates the lack of clarity in applying the *Fedorenko* test, as such behavior involves much more active participation in persecution than the questionable involvement in the above mentioned cases, which the circuits and agency also believed were unclear as to where such acts fall on the continuum.

Therefore, as the above cited cases make clear, despite its many years in existence, the Circuits continue to interpret the *Fedorenko* test inconsistently. Accordingly, because the Ninth Circuit panel's decision in Petitioner's case conflicts with decisions of other circuit courts, and because the question of what acts fall within the "persecutor of others" bar at 8 U.S.C. § 1158(b)(2)(A)(i) is an important question of federal law that remains unclear based on circuit court precedent, Petitioner's petition for writ of certiorari presents a substantial legal question that should be resolved by this Court. *See* Sup. Ct. R. 10(a).

II. The Court Of Appeals Erred In Finding Petitioner Barred From Asylum And Withholding Of Removal, As An Applicant For Asylum And Withholding Of Removal Cannot Be Deemed A Persecutor When Substantive Evidence Never Supported The Allegation That He Was Involved In Persecution And Does Support That, After Learning Of The Persecution, He Complained And Resigned

The IJ found that Petitioner arrested people knowing that they might be tortured and that he arrested guerillas, who were political opponents of the police. A.R. at 159. The panel erred when it held that substantial evidence supported this finding, as there is no evidence in the record that Petitioner arrested individuals knowing that they may be tortured by other police officers, whereas there is evidence in the record that Petitioner spoke out against the torture he later learned of and ultimately resigned because of it.

An IJ's factual findings are reviewed for substantial evidence. *See Zehatye v. Gonzales*, 453 F.3d 1182, 1184-85 (9th Cir. 2006). In reviewing the agency's factual findings under this standard, the appellate court must find that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). Thus, the appellate court must "uphold the IJ's determination if it is supported by reasonable, substantial, and probative evidence in the

record." *Zehatye*, 453 F.3d at 1185 (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). In the present case, the record lacks "reasonable, substantial, and probative evidence" that Petitioner arrested individuals knowing they would be tortured.

Without knowledge that the individuals he arrested might be tortured, Petitioner did not have the requisite scienter to be a persecutor. *See Miranda Alvarado*, 449 F.3d at 927; *see also Diaz-Zanatta v. Holder*, 558 F.3d 450, 455 (6th Cir. 2009); *Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 21-22 (1st Cir. 2007). Moreover, because Petitioner complained about his colleagues' behavior and ultimately resigned because of his disagreement with the activities, substantial evidence does not support a finding that he assisted or was involved in persecution. *See Xie v. INS*, 434 F.3d 136, 143-44 (2nd Cir. 2006) (finding that quitting a job that requires one to engage in persecutory behavior as well as engaging in "redemptive behavior" are facts relevant to the inquiry as to whether an applicant has assisted in persecution); *Singh v. Gonzales*, 417 F.3d 736, 740 (7th Cir. 2005) (where one of the factors the court considered in finding the applicant a persecutor was his refusal to quit the police force because of his desire to receive a steady pay check); *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004) (finding that substantial evidence did not support the agency's finding that Vukmirovic was barred from asylum as a persecutor where the persecutory actions were in the context of self-defense).

In this case, the first time Petitioner was required to be on patrolling duty, when he was assigned to the Fourth District of police, he was wholly unaware that those who were arrested were later tortured. A.R. at 206-07. Rather, it was not until years later when he was assigned to work at the office taking reports of detainees who had been arrested and tortured, that he discovered that people who were arrested were later tortured. *Id.* Although Petitioner testified that, after learning about the torture practices of the Guatemalan police, he would "rarely" be sent to work at roadblocks and inspection points, he *never* testified that he personally made any arrests on these assignments. *See* A.R. at 212-13. In fact, the record shows that Petitioner, who for many years had no idea that the police force engaged in torture, complained to his superiors once he realized that individuals who were arrested by police were later tortured, and that Petitioner ultimately resigned because he disagreed with the practices of the police and believed them to be illegal. A.R. at 184-87, 206-07.

On cross-examination, Petitioner explained in detail his work as a police officer for the various departments within the National Police. Petitioner began working for the police in May of 1987 and completed approximately three months of training. A.R. at 179, 202-03. Petitioner's first job was at the central office of the General Direction of the police, which was the police headquarters. A.R. at 203. While at the police headquarters, Petitioner worked for

about four months as a traffic officer, patrolling the streets. A.R. at 204. After this, and because of his typewriting ability, Petitioner was transferred to the police hospital to work for the Chief Security Officer at the National Police Hospital. A.R. at 204. Petitioner worked at the hospital for about three to four years and his job was to take reports to inform the chiefs of the injured police officers who arrived at the hospital. A.R. at 205.

After working at the National Police Hospital, Petitioner was transferred to the Fourth District of Police where initially his duty was patrolling the streets and avenues to prevent assaults and robberies. A.R. at 205-06. Petitioner patrolled the streets in patrols of two to six officers and made arrests. A.R. at 205-06. Petitioner's testimony is clear that he did *not* know that people he arrested would be tortured by the people at the police stations. A.R. at 206. Rather, Petitioner testified that he only learned of the torture committed by officers in the Fourth District later, *after* he had already patrolled and made arrests, when he was assigned to work in the office typing reports given by detainees. *See* A.R. at 206-09. Petitioner was then transferred to work with a unit called Unapu where, again, his primary duty was typing. However, on occasion, he was sent to patrol with colleagues. A.R. at 211-12. Petitioner's testimony does not indicate that he personally made arrests subsequent to his transfer to Unapu. A.R. at 211. Rather, he merely conceded that he was occasionally sent out on patrols, and testified generally before the

IJ and the Asylum Office about the duties of the patrol.[3] A.R. at 211-12.

Petitioner's simple presence at roadblocks and inspection points during arrests does not support a finding that he personally made arrests or in any way contributed to selecting who would be arrested. Petitioner's mere presence is far too tangential and attenuated to any persecution that may have subsequently occurred to constitute assistance in the persecution of others, under Ninth Circuit and other circuits' case law. *See, e.g.*, *Miranda Alvarado*, 449 F.3d at 928; *Laipenieks v. INS*, 750 F.2d 1427, 1435 (9th Cir. 1985). *See also Doe v. Gonzales*, 484 F.3d 445 (7th Cir. 2007) (finding that the mere presence of a former lieutenant in El Salvador's army on the night that other members of the operation murdered the Jesuits did not qualify as assistance in persecution).

Furthermore, Petitioner testified that, upon learning of the abusive behavior that existed in the police force, he spoke out by telling other officers that their behavior was not right and that it was illegal, to which they responded that it's the way they work and that Petitioner would have to do the same if he wanted to work with them. A.R. at 183-84.

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[3] *See, e.g.*, A.R. at 211-12 (agreeing that he told the asylum officer that "the patrol would stop cars at roadblocks, question drivers, and arrest subversives who were a threat to society"); A.R. at 213 (agreeing that he told the asylum officer that "[he] knew on many occasions [the arrested] were beaten, abused, and tortured").

Petitioner testified that he also complained to the Superior Chief of the Commissary and expressed concern that detainees were tortured after being arrested. A.R. at 184. However, the Superior Chief reacted by being very angry and telling Petitioner to keep his mouth shut. A.R. 184-85. Petitioner testified that after he complained he was faced with the repercussion of being given assignments in dangerous places where there was a lot of drug trafficking and high crime. A.R. at 185, 187.

Moreover, ultimately, after complaining to the Superior Chief of the Commissary that members of the police were acting illegally by torturing people (A.R. at 184), Petitioner personally delivered a letter of resignation to his superiors. A.R. at 186. In delivering this resignation to his superiors, Petitioner was told that they would consider him as an enemy of the force. A.R. at 186-87. Petitioner testified that in response to submitting his resignation, he was told that he shouldn't tell anyone what he saw on the force because it would cost him his life. A.R. at 187.

Thus, the evidence demonstrates that Petitioner spent the majority of his time as a police officer typing reports; the time Petitioner spent patrolling and making arrests was *before* he knew of the abuse and torture that existed in the police department and, upon learning of this abuse, Petitioner spoke out and ultimately resigned. As the Ninth Circuit erred in finding that substantial evidence supports the IJ's finding that Petitioner arrested anyone knowing that he might be tortured, the panel's conclusion that

Petitioner assisted in the persecution of others is contrary to Ninth Circuit precedent and to precedent of other circuit courts.

III. The Ninth Circuit Court Of Appeals Erred In Ruling On Petitioner's Petition For Review Where It Did Not Have Jurisdiction Because Neither The Immigration Judge Nor The Board Issued A Final Order Of Removal

The Ninth Circuit panel denied Petitioner's petition for review of the Board's decision affirming without opinion the IJ's denial of Petitioner's applications for asylum, withholding of removal, and voluntary departure. However, neither the Board nor the IJ in their respective decisions ever entered a final removal order. *See* A.R. at 122, 155-60. 1. Federal courts of appeal only retain jurisdiction to review final orders of removal. 8 U.S.C. § 1252; *Alcala v. Holder*, 563 F.3d 1009, 1011 (9th Cir. 2009).

In *Alcala*, the Ninth Circuit dismissed the petition for review finding that it lacked jurisdiction because there was no final order of removal to review. *Id.* at 1016. In that case, Alcala filed petitions for review of two orders of the BIA: (1) the BIA's order affirming the IJ's grant of the government's motion to dismiss removal proceedings in order to reinstate a prior removal order against Alcala; and (2) the BIA's order denying Alcala's motion to reopen the dismissed removal proceedings, which motion was based on ineffective assistance of counsel. *Id.* at 1012-13.

Neither the IJ nor the BIA issued removal orders, as the IJ simply granted the government's motion to dismiss removal proceedings and never adjudicated Alcala's applications for relief. *Id.* at 1012. Moreover, Alcala did not petition the court to review his prior removal order that the government sought to reinstate. *Id.* at 1013. Accordingly, the court concluded that the agency did not issue an order of removal in Alcala's case and therefore, it lacked jurisdiction over the petition for review. *Id.* at 1016.

The term "order of deportation" is statutorily defined as "the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation." 8 U.S.C. § 1101(a)(47)(A) (2009). The Board interpreted that definition in *Matter of I-S- & C-S-*, 24 I. & N. Dec. 432 (BIA 2008). The IJ in that case found the respondents removable and granted them withholding of removal, but declined the government's request to amend his order to include language ordering the respondents removed. On appeal, the Board found that the IJ erred in granting the respondents withholding without first entering an order of removal. *Id.* at 433. The Board explained that "[a]lthough entering an order of removal prior to granting withholding may appear to be a technicality, it is not an insignificant one. It is axiomatic that in order to withhold removal there must first be an order of removal that can be withheld. . . ." *Id.* The Board emphasized the

requirement under 8 C.F.R. § 1240.12(c) that the IJ's order direct the alien's removal from the United States, the termination of the proceedings, or some other appropriate disposition of the case. *Id.* (citing 8 C.F.R. § 1240.12(c) (2007)). The Board concluded that "the regulations contemplate that an Immigration Judge will enter an order that leads to a final conclusion of the removal proceedings." *Id.* at 433-34 (citing *Matter of Chamizo*, 13 I. & N. Dec. 435 (BIA 1969) and 8 U.S.C. § 1101(a)(47)(A)(2000)). Although the IJ found the respondents removable and granted withholding of removal, the Board held that their proceedings were incomplete, as there was no final removal order that could be executed. *Id.* at 434.

As in *Matter of I-S- & C-S-*, here the IJ *never* ordered Petitioner removed. *See* A.R. at 155-60, 163. Likewise, the Board only affirmed the IJ's decision and therefore *never* issued a final order of removal. *See* A.R. at 2, 122; *see also Lolong v. Gonzales*, 484 F.3d 1173, 1178 (9th Cir. 2007). Accordingly, pursuant to *Matter of I-S- & C-S-*, the agency erroneously failed to issue a final order of removal in Petitioner's case.

Petitioner's case is similar to the petitioner in *Alcala*, where the petitioner admitted the factual allegations contained in the Notice to Appear, conceded removability, and requested relief from removal. *Alcala*, 563 F.3d at 1011. In *Alcala*, rather than adjudicating these applications for relief, the IJ granted the government's motion to dismiss removal proceedings so that the government could reinstate the petitioner's prior removal orders. *Id.* at 1012. The

Board affirmed the IJ's order, and the petitioner sought appellate court review of the Board's affirmance of the IJ's decision dismissing removal proceedings. *Id.* at 1011-13. The Ninth Circuit dismissed Alcala's petitions for review "[b]ecause the authorizing statute limits our jurisdiction to review of final orders of removal – and because no such order exists in this case. . . ." *Id.* at 1013. In distinguishing the facts in *Alcala* from the court's prior decision in *Lolong*, the Ninth Circuit specified that it did not "conclude that we have jurisdiction any time an IJ might, impliedly or otherwise, think an alien is removable." *Alcala*, 563 F.3d at 1014, n. 9. Rather, the court held that, as a court of appeals, its review is limited to final orders of removal. *Id.* at 1016.

Just as the Ninth Circuit found the facts in *Alcala* to be distinguishable from *Lolong*, the present case is also distinguishable from the Ninth Circuit's *en banc* decision in *Lolong*. In *Lolong*, the Court found that it had jurisdiction to consider the petition for review. *Lolong*, 484 F.3d at 1178. In that case, Lolong conceded removability before the IJ and, as a result, the IJ held that Lolong was removable as charged. *Id.* at 1174. However, the IJ granted Lolong's application for asylum and, therefore, did not order Lolong removed. *Id.* The government thereafter appealed the IJ's grant of asylum, and the BIA granted the appeal, reversed the decision of the IJ, and granted Lolong's application for voluntary departure. *Id.*

The court concluded that, although the IJ did not specifically order the petitioner removed, it nevertheless

had jurisdiction over the petition for review. It found that where the Board overturns an IJ's grant of relief, the Board is not ordering removal in the first instance, rather it is simply reinstating the order of removal that has already been entered by the IJ and that would have taken effect but for the IJ's subsequent cancellation of removal. *Id.* at 1177.

However, Petitioner's case is distinguishable from the facts in Lolong. Whereas the Board in *Lolong* expressly reinstated the IJ's prior finding of removability and thereafter denied the petitioner's application for relief, the Board in the present case only affirmed the IJ's order. *Id.*; A.R. at App. 5. In addition, in Petitioner's case, the IJ denied all applications for relief but, nevertheless, failed to enter an order of removal. App. at 18. Moreover, to the extent that *Lolong* can be read as interpreting 8 U.S.C. § 1101(a)(47)(A) to provide that an IJ's finding of removability, standing alone, is sufficient to constitute a removal order, this discussion is dicta and is clarified by *Alcala*, *supra*.

Accordingly, in this case, the Ninth Circuit court lacked jurisdiction to hear the merits of Petitioner's claim because, as discussed *supra*, the agency never issued a final order of removal. Accordingly, the Ninth Circuit erred in denying the petition for rehearing, and should have vacated its prior decision and remanded Petitioner's case to the agency for further proceedings. Thus, Petitioner respectfully requests

that this Court grant certiorari in Petitioner's case and reverse the decision of the Ninth Circuit.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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March 16, 2010

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOEL ESCOBAR OCHOA, Petitioner, v. ERIC H. HOLDER Jr., Attorney General, Respondent.	No. 05-71765 Agency No. A072-666-088 MEMORANDUM* (Filed Aug. 10, 2009)

JOEL ESCOBAR OCHOA, Petitioner, v. ERIC H. HOLDER Jr., Attorney General, Respondent.	No. 05-76729 Agency No. A072-666-088

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted July 17, 2009†

San Francisco, California

Before: HALL, W. FLETCHER, and PAEZ, Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Joel Escobar Ochoa seeks asylum and withholding of removal. The Immigration Judge ("IJ") determined that he was ineligible for asylum and withholding of removal under the Immigration and Naturalization Act's ("INA") persecutor bar, 8 U.S.C. § 1158(b)(2)(A)(i), 8 U.S.C. § 1231(b)(3)(B)(i), due to his actions as a Guatemalan police officer. The IJ also found him statutorily eligible for voluntary departure but denied him this relief as a matter of discretion. The Board of Immigration Appeals ("BIA") affirmed without opinion and Escobar Ochoa petitioned this court to review the decision.

Escobar Ochoa later moved to reopen his proceedings so that he could again request voluntary departure based on his subsequent marriage to a U.S. citizen and the visa petition his wife had filed on his behalf. The BIA denied his request. Escobar Ochoa filed a motion for reconsideration, which the BIA also denied. He then petitioned for judicial review of this second denial, which was consolidated with his first petition for review.

We hold that Escobar Ochoa is barred from receiving asylum or withholding of removal because substantial evidence supports the IJ's decision that he assisted in the persecution of others. We therefore deny his petition on the merits. "The decision that an alien has not established eligibility for asylum or withholding of removal is reviewed for substantial evidence." *Malkandi v. Mukasey*, 544 F.3d 1029, 1035 (9th Cir. 2008) (internal quotation marks omitted). This court reviews the IJ's decision as the final

agency decision when the BIA affirms the IJ without opinion. *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 849 (9th Cir. 2003).

An alien who fears persecution in his country of origin and seeks refugee status in the United States is barred from such relief if he has persecuted others within the meaning of 8 U.S.C. § 1101(a)(42). That section provides, in relevant part,

> The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

The persecutor bar applies to aliens seeking asylum, 8 U.S.C. § 1158(b)(2)(A)(i), or withholding of removal, 8 U.S.C. § 1231(b)(3)(B)(i).

Substantial evidence supports the IJ's determination that Escobar Ochoa assisted in the persecution of others on account of their political opinion. In *Miranda Alvarado v. Gonzales*, 449 F.3d 915 (9th Cir. 2006), we held that a member of the Peruvian Civil Guard who worked as an interpreter while other guards interrogated guerrilla members using torture did assist in persecution based on political opinion. *Id.* at 928. There was substantial evidence in the record for the IJ to similarly conclude that Escobar Ochoa assisted in the persecution of others based on their political opinions. As a Guatemalan police officer, Escobar Ochoa arrested individuals knowing that

some of them would be tortured. Further, he recorded statements from detainees who had been tortured, and whose statements were given as a result of this torture. Some of these tortured individuals were guerrillas who opposed the Guatemalan government.

We dismiss for lack of jurisdiction Escobar Ochoa's petition to review the BIA's denial of his motion to reconsider. We lack jurisdiction to review the denial of a request for voluntary departure. 8 U.S.C. § 1229c(f); 8 U.S.C. § 1252(a)(2)(B)(i). In *Fernandez v. Gonzales*, 439 F.3d 592 (9th Cir. 2006), we held that 8 U.S.C. § 1252(a)(2)(B)(i) bars jurisdiction over motions to reopen "where the question presented is essentially the same discretionary issue originally decided." 439 F.3d at 600. Escobar Ochoa's motion to reopen and motion to reconsider sought voluntary departure, the same discretionary relief denied by the IJ.

We have jurisdiction over a motion to reopen or reconsider a discretionary question if "the relief sought is formally the same as was previously denied but the evidence submitted with the motion to reopen is directed at a different basis for providing the same relief." *Id.* at 601. Escobar Ochoa does not fall within this exception.

DENIED and DISMISSED.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A72-666-088 – San Francisco Date: FEB 28 2005

In re: ESCOBAR OCHOA, JOEL[4]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lloyd, Jesse Adam

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

/s/ [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE
FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

Matter of	) Date: DEC -3 2003
Joel ESCOBAR-OCHOA	) File Number: **A72-666-088**
Respondent	) In Removal Proceedings

Charge:	§ 212(a)(6)(A)(i) – Present in United States without being admitted or paroled
Applications:	Asylum, Withholding of Removal, Voluntary Departure

On Behalf of Respondent:	On Behalf of the DHS:
Jesse Lloyd Angela M. Bean & Associates 235 Montgomery Street, Suite 629 San Francisco, CA 94104	Harold Pickering Office of the District Counsel 550 Kearny Street, Ste. 1000 San Francisco, CA 94108

DECISION OF THE IMMIGRATION JUDGE

Background

Respondent, Joel ESCOBAR-OCHOA, a native and citizen of Guatemala, entered the United States without inspection at or near Douglas, Arizona, on or about October 14, 1993. Respondent submitted an application for asylum to the Immigration and

Naturalization Service ("Service")[1] on December 9, 1993, that was referred to the Immigration Court. On April 15, 1999, the Service commenced removal proceedings against Respondent by filing a Notice to Appear ("NTA") with the Immigration Court in San Francisco. The NTA charged Respondent with removability pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA" or "Act"), as an alien who entered the United States without being admitted or paroled. *See* Exhibit 1.

At an April 16, 1999, master calendar hearing, Respondent, through counsel, waived a formal reading of his rights, acknowledged receipt of the NTA, admitted all factual allegations contained in the NTA, and conceded removability. At that time, Respondent declined to designate a country of removal; the Court designated Guatemala pursuant to section 241(b)(2)(D) of the Act. Based on Respondent's admissions and the evidence in the record, the Court finds that Respondent's removability had been established by clear and convincing evidence. *See* INA § 240(c)(3). Respondent applied for relief in the forms of asylum and voluntary departure, in the alternative.

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[1] The Service was recently reorganized into the Department of Homeland Security ("DHS") by the Homeland Security Act of 2002, Pub. L. No. 197-296, 116 Stat. 2135, effective March 1, 2003. Because applications, motions, and briefs have been filed, and hearings conducted, in this matter before and after the effective date of reorganization, the terms "Service" and "DHS" will be used interchangeably in this decision.

An individual merits hearing was conducted on October 14, 2003, to determine Respondent's eligibility for relief. Respondent was present in court and testified at the hearing. Under submission, the Court considered the following documents marked into evidence:

Exhibit 1 – Notice to Appear

Exhibit 2 – Respondent's I-589 asylum application form

Exhibit 3 – Submission dated February 1, 2000, including news articles containing background information of country conditions in Guatemala

Exhibit 4 – Submission dated Sep 29, 2003, including more news articles regarding conditions in Guatemala

Exhibit 5 – Department of State, Guatemala Profile of Asylum Claims and Country Conditions from June 1997

Exhibit 6 – Department of State, Guatemala Country Reports on Human Rights Practices for 2002

Facts

Respondent testified in court about his former job as a police officer with the Guatemalan police. Respondent applied for and accepted a position as a police officer in May 1987. Respondent testified that his job began with three months of training, during

which he was taught verbal methods of interrogation. After training, Respondent was stationed at police headquarters, where he spent four months as a traffic officer, patrolling the streets. He was then assigned to work at the Police Hospital, where he was the Chief Security Officer. He took reports of the injured police officers who arrived at the hospital. Respondent testified that he was promoted to this position because of his ability to type. He held this position for three to four years.

Respondent was then transferred to the 4th Core of the police force, and resumed duties as a patrolling officer. Respondent patrolled for about four months. Respondent testified detainees were tortured while he was working in the 4th Core. The torture included placing detainees' heads in tanks of water, electric shock treatments, and putting plastic bags over detainees' heads. Respondent testified that he never participated in any of these acts of abuse. Respondent testified that when he arrested people, they were not tortured while they were under his command, but he was aware that other officers tortured detainees.

After four months of patrolling, Respondent was assigned to an office job because of his typing skills. While Respondent was working in the office, he was sometimes asked to patrol the streets, setting inspection points throughout the city and arresting those who were a threat to society. Respondent testified that he was not present during the torture of detainees, but when he was sent to take their statements before they appeared before a judge, he could tell that

they had been badly mistreated. Respondent testified that when the guerillas saw him writing reports in police station, they told him that when they got out of jail they would harm him. Respondent testified that he told his co-workers that they were committing illegal acts, but they only told him to keep his mouth shut. Respondent testified that when he complained of these acts to the police chief, he was punished by being assigned to dangerous patrol areas, and his time off was shortened. Respondent was later transferred to the 6th Core, where he worked for UNAPU, a united forces organization composed of the national police and army to fight against the guerrillas. Respondent testified that he worked there for about six months.

Respondent testified that he left the police force because he was against the injustices and abuses exercised by his coworkers against detainees. When Respondent resigned, in March 1993, his superior refused to sign his resignation papers and told him that he would be considered a traitor and enemy of the force and that he would be killed if he told anyone what happened in the prisons. Respondent testified that he thought the anger of the police chief was spawned by fear that Respondent would report him and his coworkers to the Human Rights Commission.

Following his resignation, Respondent went to live with his parents in Esquintla. Four months after his resignation, he came home to his parents' house to find the word "assassin" painted in red across the door. On August 15, 1993, men in camouflage came to

Respondent's parents' house and asked for Respondent. When Respondent's father said he did not know where he was, the men shot at him. His father was not wounded, but Respondent testified that he saw the bullet holes in the walls when he returned home. After this incident, Respondent stayed with relatives or friends in Cuyuta. Respondent also testified that his parents' house was later burned down by the men in camouflage. After his parents' house was burned, Respondent moved to Guatemala City to live with a cousin. Respondent's uncle came to Guatemala City to warn him that the guerrillas were looking for him in Cuyuta. Respondent then left the country on September 10, 1993.

Respondent testified that he had no direct contact with the guerrillas once he resigned from the police force. Respondent also testified that even though the civil war in Guatemala has ended, he still fears the guerrillas because he believes they will continue attacking police officers whom they saw while they were detained. Respondent testified that even though he never physically hurt anyone, the guerillas thought that he gave orders to torture and assumed he participated in the abusive acts because they saw him working in the police office. Respondent testified that he received a letter from his father in 1997, saying the guerillas were still looking for him.

Applicable Law

An applicant for asylum must demonstrate that he is unable or unwilling to return to his homeland because of persecution or a well-founded fear of persecution, by the government or a group that the government cannot control, based on the applicant's race, religion, nationality, membership in a particular social group, or political opinion. *See* INA § 208(b); *see also INS v. Elias-Zacarias*, 502 U.S. 478, 481-82 (1992). The applicant must produce evidence from which it is reasonable to believe that harm is motivated, at least in part, by an actual or imputed ground. *In re T-M-B-*, 21 I&N Dec. 775, 777 (BIA 1997). The Supreme Court has held that an applicant for asylum must demonstrate an actual and genuinely held subjective fear of persecution and further show that this fear is objectively reasonable, i.e., well-founded. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (1987).

An applicant is barred from a grant of asylum or withholding of removal if he ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 208(b)(2)(A)(i); 8 C.F.R. § 1208.13(c)(2)(i); INA § 241(b)(3)(B). If the evidence indicates that one or more of the grounds for mandatory denial apply, the applicant shall have the burden of proving by a preponderance of evidence that he did not so act. 8 C.F.R. § 1208.13(c)(2)(ii); 8 C.F.R. § 1208.16(d)(2). If the applicant is found to have committed acts that

fall short of the grounds of mandatory denial, he may be denied asylum in the exercise of discretion. *In re H-*, 21 I&N Dec. 337, 347 (BIA 1996).

Direct personal involvement in persecution of others is not required to trigger the mandatory bar to relief in the asylum context, so long as the alien's action or inaction furthers persecution in some way. *See Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 814 (BIA 1988). However, mere membership in an organization, even one that engages in persecution, does not bar an alien from relief. It is the objective effect of the alien's actions that is controlling. *Id.* at 814-15.

Where an alien's role in assisting political persecution was "active, personal and knowing," a belated crisis of conscience does not absolve a persecutor of his past. *Ofosu v. McElroy*, 933 F. Supp. 237, 244 (S.D.N.Y. 1995) (holding that a quasi-police officer who identified and arrested political dissidents knowing that they would be tortured and sometimes killed over his eight years in service was barred from relief as a persecutor of others). "The machinery of persecution requires as its foot soldier the arresting officer, and so long as that officer knows the likely consequences of his actions, he cannot find sanctuary in the United States under color of its protections for the persecuted. Arrest of persons the petitioner believed would be killed or tortured (or merely imprisoned indefinitely without trial) on account of their political actions constitutes persecution of the kind Congress

considered sufficient abhorrent to disqualify an applicant for refugee status." *Id.* at 239.

A court should engage in a particularized evaluation of the entire record in order to determine whether an individual's behavior was culpable to such a degree that he could be fairly deemed to have assisted or participated in persecution, *United States v. Fedorenko*, 449 U.S. 490, 512-13 n.34 (1981). An individual's responsibility for persecutory behavior "must be assessed along a continuum of conduct." *Hernandez v. Reno*, 258 F.3d 806, 813 (8th Cir. 2001).

Credibility

In all applications for asylum, the Court must make a threshold determination of the alien's credibility. *In re O-D-*, 21 I&N Dec. 1079, 1081 (BIA 1998). The burden of proof is on the applicant to establish his claims. 8 C.F.R. § 1208.13(a). An applicant should provide supporting evidence, both of general country conditions and of the specific facts sought to be relied upon by the applicant, if such evidence can reasonably be assumed to be available. *Matter of Dass*, 20 I&N Dec. 120, 124 (BIA 1989).

The Court carefully observed Respondent's demeanor while he was on the witness stand. He testified about his asylum application in a candid and forthright fashion, without hesitation. His testimony was detailed, consistent and plausible. Respondent's testimony about the abuses practiced by the Guatemalan police is corroborated by the Department of

State Country Reports on Guatemala. Respondent has also supported his testimony with pay stubs from the police force, proving he was an employee there. Therefore, the Court finds that Respondent is a credible witness and will accord his testimony full evidentiary weight.

Asylum

Respondent bases his asylum claim on his former employment with the Guatemalan police force. Respondent stated that he fears persecution from the guerillas because of their actions against members of the police, and also fears persecution from the police in retaliation for quitting his job. *See* Exhibit 2, Respondent's Declaration at 4. Respondent has testified about threats as well as violent attacks by the guerillas, such as the burning of his parents' home. Although it appears that Respondent may have a well-founded fear of persecution from the guerillas, the Court finds that Respondent is statutorily barred from asylum relief because he assisted in the persecution of others on the basis of their political opinion.

If evidence indicates Respondent was a persecutor of others, a ground for mandatory denial of asylum, Respondent has the burden of proving by a preponderance that he did not so act. *See* 8 C.F.R. § 1208.13(c)(2)(ii). Respondent's membership with the police does not in and of itself bar Respondent from asylum relief, even if the Guatemalan police are known

for engaging in persecution. *See Matter of Rodriguez-Majano*, 19 I&N Dec. at 814. However, Respondent has testified that although he never directly participated in the torture of detainees, he did arrest people, knowing they might be tortured. His testimony about his fear of the guerillas indicates that he did arrest guerillas, who were political opponents of the police. Although not binding in this circuit, the Court is persuaded by a New York District Court holding that arresting persons with a belief they may be killed or tortured is an act that furthers persecution. *See Ofosu v. McElroy*, 933 F. Supp. at 239. The Court finds that Respondent's testimony about his duties as a police officer is evidence indicating that Respondent assisted in the persecution of others. As such, the burden is on Respondent to prove that he did not so act.

The Eighth Circuit noted in *Hernandez v. Reno* that although the respondent in that case participated in persecution of others, he was forcibly recruited by the guerillas, his persecutorial actions were made under threats of death, he was only a member for 20 days, and he risked his life by disobeying orders and escaping from the guerillas. *See Hernandez v. Reno*, 258 F.3d at 815. Respondent's case is distinguishable. There is not sufficient evidence showing that Respondent strongly disagreed with the police practices because he voluntarily worked for the police force for six years. Although Respondent testified that he complained to the police chief about the abuse of the detainees, Respondent

was under no obligation to continue working for the police. The length of time Respondent served as a police officer, as well as the voluntary nature of his position, indicates that he was at least cooperating with the operations of the police force for a significant amount of time. Respondent has not met his burden of proving by preponderance of the evidence that during his employment as a police officer he did not assist, directly or indirectly, in the persecution of others. Because Respondent has not met this burden, Respondent is statutorily barred from relief from asylum and withholding of removal.

Voluntary Departure

At the conclusion of removal proceedings, the Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if the Court enters an order granting voluntary departure in lieu of removal. *See* INA § 240B(b)(1). The alien is not eligible for this relief if he has been convicted of an aggravated felony or has engaged in terrorist activity. INA § 240B(b)(1)(C). The alien must have been physically present in the United States for at least one year prior to the proceedings and must have been a person of good moral character for at least five years prior to the voluntary departure application. INA § 240B(b)(1).

Respondent has been physically present in the United States since 1993. There is no evidence that

Respondent has been convicted of an aggravated felony or engaged in terrorist activity. It also appears that Respondent has been a person of good moral character since his arrival to the United States. The Court finds Respondent is statutorily eligible for the relief of voluntary departure; however, because Respondent has been found to be a persecutor of others, the Court, in its discretion, will not reward Respondent with a grant of voluntary departure.

In light of the foregoing, the following order will be entered:

ORDER

IT IS HEREBY ORDERED that Respondent's request for asylum be **DENIED.**

IT IS FURTHER ORDERED that Respondent's request for voluntary departure be **DENIED.**

/s/ Beverly M. Phillips
Beverly M. Phillips
United States Immigration Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOEL ESCOBAR OCHOA, Petitioner, v. ERIC H. HOLDER Jr., Attorney General, Respondent.	No. 05-71765 Agency No. A072-666-088 ORDER (Filed Dec. 16, 2009)

JOEL ESCOBAR OCHOA, Petitioner, v. ERIC H. HOLDER Jr., Attorney General, Respondent.	No. 05-76729 Agency No. A072-666-088

Before: HALL, W. FLETCHER, and PAEZ, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges W. Fletcher and Paez have voted to deny the petition for rehearing en banc; and Judge Hall so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc, filed November 5, 2009, are DENIED.

STATUTORY PROVISIONS

Section 101 of the Immigration and Nationality Act, codified at 8 U.S.C. § 1101, provides in relevant part:

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been

persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

* * *

(47)(A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.

(B) The order described under subparagraph (A) shall become final upon the earlier of –

(i) a determination by the Board of Immigration Appeals affirming such order; or

(ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

Section 208 of the Immigration and Nationality Act, codified at 8 U.S.C. § 1158, provides in relevant part:

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

* * *

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that –

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

Section 241 of the Immigration and Nationality Act, codified at 8 U.S.C. § 1231, provides in relevant part:

(b) Countries to which aliens may be removed

* * *

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that –

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

Section 242 of the Immigration and Nationality Act, codified at 8 U.S.C. § 1252, provides in relevant part:

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

REGULATORY PROVISIONS

8 C.F.R. § 208.13 and § 1208.13 provide in relevant part:

(c) Mandatory denials –

(1) Applications filed on or after April 1, 1997. For applications filed on or after April 1, 1997, an applicant shall not qualify for asylum if section 208(a)(2) or 208(b)(2) of the Act applies to the applicant. If the applicant is found to be ineligible for asylum under either section 208(a)(2) or 208(b)(2) of the Act, the applicant shall be considered for eligibility for withholding of removal under section 241(b)(3) of the Act. The applicant shall also be considered for eligibility for withholding of removal under the Convention Against Torture if the applicant requests such consideration or if the evidence presented by the alien indicates that the alien may be tortured in the country of removal.

(2) Applications filed before April 1, 1997.

(i) An immigration judge or asylum officer shall not grant asylum to any applicant who filed his or her application before April 1, 1997, if the alien:

* * *

(E) Ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

* * *

(ii) If the evidence indicates that one of the above grounds apply to the applicant, he or she shall have the burden of proving by a preponderance of the evidence that he or she did not so act.

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8 C.F.R. § 208.16 and § 1208.16 provide in relevant part:

(d) Approval or denial of application –

(1) General. Subject to paragraphs (d)(2) and (d)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established pursuant to paragraphs (b) or (c) of this section.

(2) Mandatory denials. Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under section 241(b)(3) of the Act or under the Convention Against Torture shall be denied if the applicant falls within section 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability of one or more of the

grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

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8 C.F.R. § 1240.12 provides in relevant part:

(c) Order of the immigration judge. The order of the immigration judge shall direct the respondent's removal from the United States, or the termination of the proceedings, or other such disposition of the case as may be appropriate. The immigration judge is authorized to issue orders in the alternative or in combination as he or she may deem necessary.

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449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 686

Supreme Court of the United States
Feodor FEDORENKO, Petitioner,
v.
UNITED STATES.
No. 79-5602.

Argued Oct. 15, 1980.
Decided Jan. 21, 1981.

* * *

The Court of Appeals evidently accepted the District Court's construction of the Act since it agreed that the Government had failed to show that petitioner was ineligible for a DPA visa. 597 F.2d, at 953. Because we are unable to find any basis for an "involuntary assistance" exception in the language of § 2(a), we conclude that the District Court's construction of the Act was incorrect. The plain language of the Act mandates precisely the literal interpretation that the District Court rejected: an individual's service as a concentration camp armed guard-whether voluntary or involuntary-made him ineligible for a visa. That Congress was perfectly capable of adopting a "voluntariness" limitation where it felt that one was necessary is plain from comparing § 2(a) with § 2(b), which excludes only those individuals who "*voluntarily* assisted the enemy forces . . . in their operations. . . ." Under traditional principles of statutory construction, the deliberate omission of the word "voluntary" from § 2(a) compels the conclusion

that the statute made *all* those who assisted in the persecution of civilians ineligible for visas.[34] *See National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed.2d 646 (1974); *Botany Worsted Mills v. United States*, 278 U.S. 282, 289, 49 S.Ct. 129, 132, 73 L.Ed. 379 (1929). As this Court has previously stated: "We are not at liberty to imply a condition which is opposed to the explicit terms of the statute. . . . To [so] hold . . . is not to construe the Act but to amend it." *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 38, 55 S.Ct. 31, 36, 79 L.Ed. 176 (1934). *See FTC v. Sun Oil Co.*, 371 U.S. 505, 514-515, 83 S.Ct. 358, 364-365, 9 L.Ed.2d 466 (1963).

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[34] The solution to the problem perceived by the District Court, *see* n 33, *supra*, lies, not in "interpreting" the Act to include a voluntariness requirement that the statute itself does not impose, but in focusing on whether particular conduct can be considered assisting in the *persecution* of civilians. Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case. As for the District Court's concern about the different treatment given to visa applicants who had served in Axis combat units who were found eligible for visas if they could show that they had served involuntarily, this distinction was made by the Act itself.

Thus, the plain language of the statute and Jenkins' uncontradicted and unequivocal testimony leave no room for doubt that if petitioner had disclosed the fact that he had been an armed guard at Treblinka, he would have been found ineligible for a visa under the DPA.

* * *

584 F.3d 75 (2nd Cir. 2009)

YAN YAN LIN, Petitioner,

v.

Eric H. HOLDER, Jr., Attorney General of the United States of America, and Department of Homeland Security, Respondents.*

Docket No. 07-5791-ag.

United States Court of Appeals,
Second Circuit.

Argued: May 21, 2009.

Decided: Oct. 14, 2009.

Stuart Altman, Law Offices of Stuart Altman, New York, NY, for Petitioner.

Stacy Stiffel Paddack, (Anthony Norwood, Sherrie Waldrup, on the brief), Office of Immigration Litigation, for Gregory G. Katsas, Assistant Attorney General, United States Department of Justice, Civil Division, Washington, D.C., for Respondent.

Before: JACOBS, Chief Judge, KEARSE, and STRAUB, Circuit Judges.

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Eric H. Holder, Jr. is automatically substituted for Michael B. Mukasey.

DENNIS JACOBS, Chief Judge:

Petitioner Yan Yan Lin ("Lin" or "Petitioner"), a native and citizen of the People's Republic of China, seeks review of the December 17, 2007 order of the Board of Immigration Appeals ("BIA") affirming the January 24, 2006 decision of Immigration Judge ("IJ") Vivienne E. Gordon-Uruakpa denying her application for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). *In re Yan Yan Lin*, No. A95 709 889 (B.I.A. Dec. 17, 2007), *aff'g* No. A95 709 889 (Immig.Ct.N.Y.City, Jan. 24, 2006). Lin was a maternity nurse employed by a state general hospital that (sometimes) performed forced abortions pursuant to China's family planning policy. The IJ denied relief (in part) on the ground that Lin was therefore a "persecutor" and statutorily ineligible for asylum or withholding of removal under the Immigration and Nationality Act ("INA"). *See* 8 U.S.C. §§ 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i). The IJ also denied Lin's request for CAT protection because Lin failed to demonstrate that it was "more likely than not" that she would be tortured if removed to China. *See* 8 C.F.R. § 208.16(c)(2). The BIA affirmed the IJ's decision and dismissed the appeal. This petition for review followed.

The main issue on appeal is whether Lin's activity as a nurse in China amounted to "assistance or participation" in persecution which would render her ineligible for asylum or withholding of removal under the INA's "persecutor bar." We conclude that it did not.

I

The facts bearing on this appeal are based on Lin's testimony, which was found to be credible.

From 2002 to 2005, Lin was employed in the obstetrics and gynecology department of the state-run "People's Number One Hospital" in China. Her duties included, among other things, tending to pregnant women, assisting in the performance of ultrasound and other prenatal examinations, participating in live-birth deliveries, caring for newborns, and providing recovery care to women who had undergone forced abortions. Lin did not participate in the abortion procedure itself, but the examinations in which Lin assisted were sometimes used to determine a fetus's position so that a forced abortion could be performed without threatening the life of the mother.

In July 2004, a woman Lin knew arrived at the hospital escorted by family planning authorities. The woman was five months pregnant and was scheduled to undergo a forced abortion in accordance with China's family planning policy. A pre-abortion examination at which Lin assisted revealed a complication that would delay the procedure for two days. During the delay, Lin found the woman crying in her room; the woman stated that she wished to bear the child, and wanted Lin's help avoiding the abortion. At around one o'clock in the morning, after Lin's shift ended and the person guarding the woman's room had fallen asleep, Lin opened a side door of the hospital and the woman escaped by motorcycle with

her husband, whom Lin had alerted to come to the hospital. Questioned the next day, Lin denied any knowledge of the escape.

Seven months later, in February 2005, a doctor and several family planning officials came to Lin's house to question her again about the incident. (They apparently learned of her involvement after interrogating the woman who had escaped.) Lin was not home at the time, but was warned of the visit and fled to her aunt's house, where she learned that she had been dismissed from the hospital and that officials continued to search for her. So she decided to leave China.

Lin arrived in Los Angeles on March 27, 2005 without valid entry documents, and applied for admission. Lin was taken into custody and served with a notice to appear, charging her with being subject to removal for her failure to possess valid travel documents under section 212(a)(7)(i)(I) of the INA, 8 U.S.C. § 1182(a)(7)(A)(i)(I). Thereafter, Lin was released from custody, paroled into the United States, and notified of the date for her removal hearings.

On June 23, 2005, Lin appeared with counsel before the IJ and admitted that she lacked proper documentation, but filed an application for asylum, withholding of removal, and withholding under the Convention Against Torture. Lin admitted that she had never been arrested, detained, or physically

mistreated in China, but alleged fear of persecution for her resistance to China's family planning policy.

Following a January 24, 2006 hearing on the merits, the IJ found that Lin had "for the most part been a credible witness." Relying on Lin's testimony, the IJ found that she had "participated in the persecution of other individuals on account of their political opinion" and concluded that she was therefore "statutorily barred from the relief of asylum and [w]ithholding of [r]emoval" under the INA provisions barring relief for individuals who themselves engaged in the persecution of others. *See* 8 U.S.C. §§ 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i). The finding was based on the grounds that: (i) Lin knew that several of the women she assisted in examining were scheduled to undergo forced abortions (because they were escorted to the hospital by uniformed cadre and guarded during their stay), (ii) Lin's assistance to doctors in the examinations provided a "necessary step for the involuntary abortion," and (iii) Lin's actions "further[ed] the persecution of these women." The IJ also determined that Lin "failed to demonstrate that it [was] more likely than not that she would be tortured . . . [if] removed to China." Accordingly, the IJ denied her applications for asylum and withholding of removal, and her request for CAT protection, and ordered her removed from the United States to China.

The BIA dismissed Lin's appeal on December 17, 2007, concluding that Lin failed to show by a preponderance of the evidence "that she did not assist

doctors in carrying out forced abortions," and could not demonstrate that her actions were only "tangential" to the procedure. Instead, the BIA concluded that Lin's conduct "as a whole" was "active and contributed directly to the persecution of others." The BIA acknowledged that Lin helped one woman escape a forced abortion, but decided that this "redemptive behavior . . . [did] not serve as a basis for relieving the respondent of the consequences of having previously assisted in persecution." As to the CAT claim, the BIA agreed with the IJ that Lin failed to demonstrate eligibility for CAT protection because she conceded that she had never been arrested, detained, or physically mistreated in China, and she presented no other evidence to indicate that if she were returned to China, she would be tortured. Accordingly, the BIA dismissed Lin's appeal in its entirety.

II

We review the BIA's factual findings under the "substantial evidence" standard, and uphold them "if they are supported by 'reasonable, substantial and probative evidence in the record.'" *Weng v. Holder*, 562 F.3d 510, 513 (2d Cir.2009) ("*Weng*") (quoting *Lin Zhong v. U.S. Dep't of Justice*, 480 F.3d 104, 116 (2d Cir.2007)). The BIA's application of law to fact is reviewed *de novo*. *Id.*

Where "the BIA did not expressly 'adopt' the IJ's decision, but its brief opinion closely tracks the IJ's

reasoning," we consider in the interest of completeness both the IJ and BIA opinions, especially where doing so does not affect the outcome. *Wangchuck v. Dep't of Homeland Sec.*, 448 F.3d 524, 528 (2d Cir.2006).

III

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien determined to be a "refugee" within the meaning of the INA. 8 U.S.C. § 1158(b)(1)(A). The INA defines a "refugee" as a person "who is unable or unwilling to return to . . . [a] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42). Excluded from that definition is "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.*; *see also* 8 U.S.C. § 1158(b)(2)(A)(i). This exclusion, the so-called "persecutor bar," prevents those who have persecuted others (or assisted or participated in the persecution of others) from gaining refugee status and seeking asylum in the United States. *See* 8 U.S.C. § 1231(b)(3)(B)(i); *Negusie v. Holder*, ___ U.S. ___, 129 S.Ct. 1159, 1162, 173 L.Ed.2d 20 (2009); *Weng*, 562 F.3d at 513-14. The bar also applies to those seeking withholding of removal, *see* 8 U.S.C. § 1231(b)(3)(B)(i), but "[i]t does not disqualify an alien

from receiving a temporary deferral of removal under the Convention Against Torture." *Negusie*, 129 S.Ct. at 1162; *see also* 8 C.F.R. § 208.17(a).

In this Circuit, four relevant factors determine whether the persecutor bar applies to a particular alien: (1) whether the alien was "involved in" acts of persecution by ordering, inciting, or actively carrying out the acts; (2) whether there is a nexus between the persecution and the victim's race, religion, nationality, membership in a particular social group, or political opinion; (3) whether the alien's actions, if not outright "involvement" under the first factor, amount to assistance or participation in persecution; and (4) whether the alien had sufficient knowledge that her actions might assist in persecution to make those actions culpable. *See Weng*, 562 F.3d at 514; *Balachova v. Mukasey*, 547 F.3d 374, 384-85 (2d Cir.2008). For the persecutor bar to apply, an alien's conduct must be persecution under *either* the first or third factors, *and* must also satisfy the second and fourth factors. In short, Lin is a persecutor if she knowingly did or assisted acts that would be persecution on account of the victim's victim's [sic] race, religion, nationality, membership in a particular social group, or political opinion.

It is settled law that forced abortion is persecution on account of political opinion. *See* 8 U.S.C.

§ 1101(a)(42) (*see* text in the margin[1]). And knowledge is not an issue in this case. The critical question, then, is whether Lin did or assisted acts of persecution. It is undisputed that Lin did not order, incite, or actively carry out the forced abortions; so Lin's conduct does not amount to "involvement" under the first factor. *See Balachova*, 547 F.3d at 384. Our focus therefore is on whether Lin "assisted or participated" in persecution under the third factor.

"In determining whether . . . conduct amounts to 'assistance' in persecution, we look to [the alien's] behavior as a whole." *Weng*, 562 F.3d at 514. "Where the [alien's] conduct [is] active and [has] direct consequences for the victims . . . it [is] 'assistance in persecution.' Where the conduct [is] tangential to the acts of oppression and passive in nature, however, we decline[ ] to hold that it amount[s] to such assistance." *Zhang Jian Xie v. INS*, 434 F.3d 136, 143 (2d Cir.2006) ("*Xie*").

Two cases, *Xie* and *Weng*, discuss forced abortion practices in this context and illustrate conduct that amounts to persecution and conduct that does not.

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[1] "[A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure . . . shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion." 8 U.S.C. § 1101(a)(42), *see also Weng*, 562 F.3d at 514.

Xie, 434 F.3d at 143; *Weng*, 562 F.3d at 514-15. Lin's case falls in a zone between the events and behaviors described in those decisions.

In *Xie*, the petitioner worked as a driver for the county health department in China. Among other duties, he occasionally "transported pregnant women to hospitals in the locked back of a van, against their will, so that county officials could perform forced abortions on them pursuant to China's mandatory family planning policies." 434 F.3d at 138. We agreed with the BIA's conclusion that the petitioner was subject to the persecutor bar because his actions "contributed directly" to the persecution: "[b]y driving the van in which the women were locked, Xie ensured that they were delivered to the place of their persecution. . . . [He] played an active and direct, if arguably minor, role." *Id.* at 143. We rejected Xie's argument that his actions were involuntary, and therefore excusable, in the sense that they were required by his job because "nothing in the record indicate[d] that Xie did not have the ability to quit his job as a driver at any time in order to avoid the persecution of women." *Id.* We also rejected Xie's argument that his petition should have been saved by a redemptive act (he once allowed an unguarded pregnant woman he was transporting to go free after she pleaded with him). We explained that "redemptive behavior is [not] necessarily irrelevant to the inquiry as to whether an applicant has assisted in persecution," but "the BIA was not in error" when it

determined that Xie was ineligible for asylum. *Id.* at 144.

In *Weng*, the petitioner worked as a nurse's assistant at a public hospital in China. 562 F.3d at 512. She performed administrative tasks such as registration of patients and maintenance of files, but she also provided post-surgical care, including the taking of temperature and the recording of vital signs. *Id.* at 512, 515. On one occasion, Weng "guarded" women scheduled for forced abortions by sitting outside the locked door of her regular shift room while the women waited inside. *Id.* at 515. On that evening, Weng helped one of the women to escape the hospital before the procedure. *Id.* at 512-13, 515.

In deciding whether Weng had provided "assistance" in persecution, we observed that the Supreme Court, deciding the same question, had "easily distinguished between the conduct of a concentration camp barber who did not assist persecution and that of armed guards who did." *Id.* at 515 (citing *Fedorenko v. United States*, 449 U.S. 490, 512 n. 34, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981)). Nevertheless, the case law "offered scant guidance on how to classify less overtly culpable conduct." *Id.*

We decided in *Weng* that the "post-surgical care did not contribute to, or facilitate, the victims' forced abortions in any 'direct' or 'active' way [because] [Weng's] conduct neither caused the abortions, nor made it easier or more likely that they would occur[;]

[the] actions were, at most, 'tangential,' 'passive accommodation' of the conduct of others" and did not trigger the persecutor bar. *Id.* As to the single incident where Weng "guarded" forced abortion patients, the Court observed that "guarding patients awaiting forced abortions comes closer to active assistance than does post-operative monitoring of vital signs," but that Weng "was unarmed, . . . performed actual guard duties for only approximately ten minutes before accompanying one of the patients to the restroom, . . . helped one of the patients to escape, and . . . lost her job as a result." *Id.* Under those circumstances, the Court concluded that "Weng's conduct, considered in its entirety, was tangential, and not sufficiently direct, active, or integral to the administering of forced abortions as to amount to assistance in persecution." *Id.*

Lin's case is closer to *Weng* than to *Xie*. Lin did not participate directly in forced abortions, and the following circumstances are decisive:

1. Lin assisted examinations in the maternity ward that were used to detect the position and health of the fetus. The kinds of examinations in which Lin assisted (*e.g.*, ultrasounds) are given to all pregnant women, whether the pregnancy is scheduled to result in a live birth, a voluntary abortion, or a forced abortion. The exams are more akin to routine patient care than a protocol specific to forced abortions.

2. As in *Weng*, the examinations in which Lin assisted "did not contribute to, or facilitate, the

victims' forced abortions in any 'direct' or 'active' way" because they did not "cause[ ] the abortions, nor [did they make] it. [sic] more likely that they would occur." *Id.* Lin's actions were therefore "tangential, and not sufficiently direct, active, or integral to the administering of forced abortions as to amount to assistance in persecution." *Id.*

Our conclusion is further bolstered by Lin's redemptive act. Although the act itself is not dispositive, we must view Lin's conduct "as a whole," *id.*, and the act suggests that she did not actively "assist" or participate in persecution. We conclude as a matter of law that Lin's conduct does not subject her to the persecutor bar. We grant Lin's petition with respect to the BIA's denial of her applications for asylum and withholding of removal, and remand for the BIA to determine, in the first instance, if Lin is eligible for such relief.

(A) The CAT Determination

In order to establish eligibility for CAT withholding, the petitioner must demonstrate that she will "more likely than not" be tortured if removed to her home country. *See* 8 C.F.R. § 208.16(c)(2). Here, the IJ and the BIA concluded that Lin failed to sustain her burden of demonstrating that it was "more likely than not" that she would be tortured in China because she affirmatively testified that she had never been arrested, detained, or physically mistreated in her home country. We see no error in

this conclusion and deny Lin's petition for review on this ground.

CONCLUSION

For the foregoing reasons, Lin's petition for review is granted as to her applications for asylum and withholding of removal, and denied as to withholding of removal under CAT; the petition is remanded to the BIA for further proceedings consistent with this opinion.

No. 09-1132

In the Supreme Court of the United States

JOEL ESCOBAR OCHOA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supported the immigration judge's conclusion that petitioner was ineligible for asylum because he had assisted in the persecution of others, 8 U.S.C. 1158(b)(2)(A)(i).

2. Whether there was a final order of removal that the court of appeals had jurisdiction to review.

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In the Supreme Court of the United States

No. 09-1132

JOEL ESCOBAR OCHOA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the *Federal Reporter* but is reprinted in 340 Fed. Appx. 420. The opinions of the Board of Immigration Appeals (Pet. App. 5) and the immigration judge (Pet. App. 6-18) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2009. A petition for rehearing was denied on December 16, 2009 (Pet. App. 19-20). The petition for a writ of certiorari was filed on March 16, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Attorney General may, in his discretion, grant asylum to an alien who demonstrates that he is a "refugee." 8 U.S.C. 1158(b)(1)(A). A "refugee" is an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). An applicant bears the burden of demonstrating he is eligible for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d).

An alien is statutorily ineligible for asylum if the Attorney General determines that "the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1158(b)(2)(A)(i); see 8 U.S.C. 1101(a)(42)(B) ("[A]ny person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion" is not a "refugee.").

b. An alien may also apply for withholding of removal. See 8 U.S.C. 1231(b)(3). Withholding of removal is required if the alien demonstrates that his "life or freedom would be threatened" in the country of removal "because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). As with asylum, an alien is not eligible for withholding of removal if the Attorney General determines that the alien "ordered, incited, assisted, or otherwise participated in the persecution of an

individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(B)(i). Like its asylum counterpart, this provision is referred to as a "persecutor bar."

c. For asylum applications, such as petitioner's, filed before April 1, 1997, a regulation provides that if "the evidence indicates" that the applicant "[o]rdered, incited, assisted, or otherwise participated in the persecution of any person" for a proscribed reason, "he or she shall have the burden of proving by a preponderance of the evidence that he or she did not so act." 8 C.F.R. 1208.13(c)(2)(i)(E) and (ii); see Administrative Record 277-281 (A.R.) (petitioner's request for asylum dated November 20, 1993). The applicant bears the same burden of establishing that the persecutor bar does not render him ineligible for withholding of removal. 8 C.F.R. 1208.16(d)(2).

2. Petitioner is a native and citizen of Guatemala who entered the United States on or about October 14, 1993 without being inspected and admitted or paroled by an immigration official. Pet. App. 6. He filed an application for asylum with the Immigration and Naturalization Service, which referred his application to an immigration judge (IJ). *Id.* at 6-7.

At his hearing before the IJ, petitioner, through counsel, conceded removability but renewed his request for asylum. Pet. App. 7. Petitioner testified that from May 1987 through March 1993 he was a police officer in the Guatemalan national police force. A.R. 59. For a time, he was a patrol officer working in the "Fourth District." A.R. 85. Some of the people he arrested while working in that district were tortured once they arrived at the police station. A.R. 86. Petitioner testified that

he did not know about this mistreatment at the time he was a Fourth District patrol officer, but discovered it later when his supervisors assigned him to type interrogation reports at the station. A.R. 86-87.

In that role, he would take statements from detainees after they had been tortured. A.R. 88-89. Among the detainees were guerrillas fighting the Guatemalan government. A.R. 67. Petitioner said that he "could tell" that the detainees from whom he took statements "were really, really mistreated." A.R. 89.[1] In a declaration submitted with his asylum application, petitioner said that "[t]he police officers who had picked up the detainees told [him] what to write" in the statements he typed and that he "began to realize that much of what they said was untrue." A.R. 287. As a result, "[i]ndividuals would suffer much abuse * * * in the criminal justice system on trumped up charges." *Ibid.*

After this experience, petitioner was transferred to "Unapu," a joint police military taskforce. A.R. 89. In that capacity, he went on patrol, staffed checkpoints, and arrested suspected guerrillas. A.R. 91-92. He testified that he knew that "on many occasions" those his patrol arrested were "beaten, abused, and tortured." A.R. 93.

Petitioner eventually resigned from the police force, and his superiors became "angry" because they feared he would report them to the human rights commission.

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[1] Petitioner testified:

> They had a big tank of water and they will put their heads inside the water tank for a period of time and then when they realize[d] they were about to drown, they would take them out. Also, they will apply electric shocks, electricity, and also they will cover their heads with plastic bags full with gas.

A.R. 64-65.

A.R. 93. He never did so, however, because he feared retaliation. *Ibid.* Petitioner testified that he fled Guatemala after the guerillas made several attempts to locate him and he began to fear they would attempt to kill him. A.R. 71-76, 288-289.

3. After conducting a "particularized evaluation of the entire record," the IJ issued a written decision denying petitioner's applications for asylum and withholding of removal. Pet. App. 14; see *id.* at 6-18. The IJ noted that petitioner "may have a well-founded fear of persecution from the guerillas," but found him "statutorily barred from asylum relief because he assisted in the persecution of others on the basis of their political opinion." *Id.* at 15. The IJ explained that petitioner's "membership with the police does not in and of itself bar [him] from asylum relief, even if the Guatemalan police are known for engaging in persecution." *Id.* at 15-16. The IJ found, however, that petitioner engaged in conduct beyond mere membership in the police force; petitioner testified that "although he never directly participated in the torture of detainees, he did arrest people, knowing they might be tortured." *Id.* at 16. The IJ concluded that "arresting persons with a belief they may be killed or tortured is an act that furthers persecution." *Ibid.*

Because of the "evidence indicating that [petitioner] assisted in the persecution of others," the IJ noted that the burden shifted to him to establish that he did not do so. Pet. App. 15-16 (citing 8 C.F.R. 1208.13(c)(2)(ii)). The IJ found that petitioner failed to carry that burden. Although petitioner "testified that he complained to the police chief about the abuse of the detainees," he "voluntarily worked for the police force for six years." *Ibid.* "The length of time [petitioner] served as a police officer, as well as the voluntary nature of his position, indi-

cates that he was at least cooperating with the operations of the police force for a significant amount of time." *Id.* at 17.

4. Petitioner appealed the IJ's decision to the Board of Immigration Appeals (BIA). On February 28, 2005, the BIA affirmed the IJ's decision without issuing a separate opinion. Pet. App. 5; see *ibid.* (IJ's decision "is, therefore, the final agency determination").

5. Petitioner filed a petition for review in the court of appeals, which denied it in a brief unpublished opinion. Pet. App. 1-4.

The court of appeals held that petitioner was "barred from receiving asylum or withholding of removal because substantial evidence support[ed] the IJ's decision that he assisted in the persecution of others." Pet. App. 2. The court noted that in *Miranda Alvarado* v. *Gonzales*, 449 F.3d 915, 928 (9th Cir.), cert. denied, 549 U.S. 1000 (2006), it had "held that a member of the Peruvian Civil Guard who worked as an interpreter while other guards interrogated guerrilla members using torture did assist in persecution based on political opinion." Pet. App. 3. The court found petitioner's case "similar[]" in that he "arrested individuals knowing that some of them would be tortured" and "recorded statements from detainees who had been tortured, and whose statements were given as a result of this torture." *Id.* at 3-4; see *id.* at 4 ("Some of these tortured individuals were guerillas who opposed the Guatemalan government.").

ARGUMENT

Petitioner's challenge to the court of appeals' unpublished substantial evidence determination presents no question of law meriting this Court's review. He claims that the court of appeals' decision conflicts with one of

its prior opinions, but there is no conflict and, even if there were, any inconsistency in Ninth Circuit precedent would not call for this Court's intervention. Nor does the court of appeals' decision conflict with that of any other court. Finally, petitioner did not properly raise, and the court of appeals did not address, his claim that it could not decide his petition for review on the merits because there was no final order of removal. The claim is wrong in any event.

1. Petitioner argues that the court of appeals erred in finding substantial evidence in support of the IJ's ruling that he arrested people with knowledge that they might be tortured. Pet. 19-25. The court of appeals' resolution of that question turned on the particular record in this case and was correct.

In immigration cases, "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. 1252(b)(4)(B). The court of appeals correctly held that petitioner's challenge to the IJ's factual findings failed to meet this demanding standard.

Petitioner testified that he did not know at the time he was on patrol in the "Fourth District" that those he arrested would be tortured. A.R. 86-87. He later learned of that practice, however, when he was assigned to take statements from those who had been arrested and could see that they had been tortured. *Ibid.* It was *after* he gained this knowledge that petitioner went back on patrol duty, this time with the joint military-police group known as "Unapu." A.R. 89.

As part of that group, petitioner patrolled Guatemala City, staffed checkpoints, and arrested suspected guerrillas who Unapu viewed as "a threat to society." A.R. 91-92. During his immigration hearing, petitioner an-

swered "[y]es" to the question "do you recall telling [the asylum officer] that as to those your patrol arrested that you knew on many occasions they were beaten, abused, and tortured?" A.R. 93. Whether or not petitioner "personally" made any arrests by himself, see Pet. 21, he testified that he was part of a group of officers who did so together. Petitioner's own testimony thus provided substantial evidence in support of the IJ's finding that "although [petitioner] never directly participated in the torture of detainees, he did arrest people, knowing they might be tortured." Pet. App. 16.

2. Petitioner contends that the court of appeals' "conclusion that [he] assisted in the persecution of others when he recorded the statements of detainees who had been tortured, some of whom were guerrillas, is contrary to the precedent of the Ninth Circuit." Pet. 7. This contention does not merit this Court's review.

The IJ based her conclusion that petitioner assisted in the persecution of others on the fact that he "arrest-[ed] people, knowing they might be tortured," not on his role in typing statements from arrestees. Pet. App. 16. The court of appeals found substantial evidence in support of that finding. *Id.* at 3-4 (Petitioner "arrested individuals knowing that some of them would be tortured."). The court of appeals then went on to make the "[f]urther" observation that petitioner "recorded statements from detainees who had been tortured, and whose statements were given as a result of this torture." *Id.* at 4. That was not the basis of the IJ's or the court of appeals' decision, however, so this case does not present the question whether "merely [taking] statements of individuals after they were mistreated" "falls squarely outside" a line established by Ninth Circuit precedent.

Pet. 9 (citing *Miranda Alvarado* v. *Gonzalez*, 449 F.3d 915, 928, cert. denied., 549 U.S. 1000 (2006)).

Moreover, even if there were a conflict between Ninth Circuit decisions, this Court's review would not be warranted to resolve it. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). This is especially true given that the decision at issue here is unpublished and thus non-precedential. See 9th Cir. R. 36-3(a).

3. Petitioner claims that the "'continuum of conduct' test" derived from *Fedorenko* v. *United States*, 449 U.S. 490 (1981), "needs further clarification" because the circuits have applied the test differently. Pet. 11. Specifically, petitioner asserts that the application of the "continuum of conduct" test in his case is inconsistent with its application in decisions from other courts of appeals. Pet. 11-18.

Courts typically "turn[] for guidance" to this Court's decision in *Fedorenko* when considering what type of conduct the persecutor bar covers. *Miranda Alvarado*, 449 F.3d at 925. In *Fedorenko*, the Court found that a World War II concentration camp guard who had shot at fleeing inmates had "assisted in the persecution of civilians" within the meaning of the Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009, notwithstanding his claim that he had done so involuntarily. 449 U.S. at 495, 500, 512. The Court concluded that the statute included no voluntariness requirement, but did require "focus[] on whether particular conduct can be considered assisting in the *persecution* of civilians." *Id.* at 512 n.34. The Court went on to explain:

> [A]n individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians.

> On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case.

Id. at 512-513 n.34.

As the court of appeals has explained, "*Fedorenko* thus indicated a continuum of conduct against which an individual's actions must be evaluated so as to determine personal culpability." *Miranda Alvarado*, 449 F.3d at 926.[2] Petitioner does not contend that there is any difference in the legal standards applied by the circuits when determining whether a person's conduct renders him a "persecutor of others." Instead, he cites a number of circuit decisions reaching different bottom-line results (Pet. 12-17), but that just reflects the natural out-

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[2] In *Negusie* v. *Holder*, 129 S. Ct. 1159 (2009), the Court held that *Fedorenko*'s conclusion that there was no duress defense under the Displaced Persons Act was not "controlling" on the question whether the INA's persecutor bar provisions permit such a defense. *Id.* at 1165. Even after *Negusie*, the courts of appeals continue to look to *Fedorenko* for guidance on the question of "what kind of conduct constitutes persecution or assistance in persecution" in cases like this one where there is no question that the alien "acted voluntarily." *Nguyen* v. *Holder*, 336 Fed. Appx. 680, 681 n.1 (9th Cir. 2009); see *Parlak* v. *Holder*, 578 F.3d 457, 469 (6th Cir. 2009) ("Given that *Negusie* analyzed *Fedorenko*'s application only in the context of allegedly involuntary actions, we find that *Fedorenko*'s analysis of what constitutes persecution remains instructive where voluntariness is not at issue."), cert. denied, No. 09-992 (June 14, 2010).

come when courts apply a legal standard to disparate factual situations. Moreover, there is no inconsistency between any of those decisions and the court of appeals' decision here; in none of the other cases did a court find the persecutor bar inapplicable to an alien who "arrest-[ed] people, knowing they might be tortured." Pet. App. 16.

4. Petitioner argues that "the Ninth Circuit * * * lacked jurisdiction to hear the merits of [his] claim because * * * the agency never issued a final order of removal." Pet. 29. Petitioner did not raise that claim in his merits brief in the court of appeals (attempting to do so for the first time in his motion to stay the mandate), and the lower court did not address it. Because this contention was neither properly pressed nor passed on below, this Court should not decide it in the first instance. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)).

In any event, petitioner's contention fails because there is a final order of removal in this case. The IJ's written decision expressly states that at the April 16, 1999, master calendar hearing, petitioner "admitted all factual allegations contained in the [Notice to Appear], and conceded removability," and that the judge designated Guatemala as the country of removal. Pet. App. 7. The decision also includes the IJ's finding that petitioner's removability had been established by clear and convincing evidence. *Ibid.*

As the court of appeals held in *Lolong* v. *Gonzales*, 484 F.3d 1173 (9th Cir. 2007) (en banc), the IJ's determination of removability constitutes a reviewable final or-

der of removal—a conclusion that is only underscored by the IJ's further decision to deny petitioner's requests for relief from removal. *Id.* at 1177; see 8 U.S.C. 1101(a)(47) (defining an "order of deportation" as an order by an IJ "concluding that the alien is deportable or ordering deportation," which becomes final upon the BIA's affirmance or upon the expiration of the appeal period, whichever is earlier). This analysis is "consistent with the approach adopted by all * * * circuits to have considered this issue." *Lolong*, 484 F.3d at 1177 (citing cases).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2010

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[3] *Alcala* v. *Holder*, 563 F.3d 1009 (9th Cir. 2009), cited by petitioner as the authority for his argument, is inapposite because in contrast to the instant case and *Lolong*, "the IJ made no finding of removability" in *Alcala*. *Id.* at 1014 n.9.

1604 (3)

No. 09-1132

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

JOEL ESCOBAR OCHOA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
Attorney General of the United States,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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ARGUMENT

The government fails to show why review in this case should be denied. Contrary to Respondent's arguments, the record in Petitioner's case lacks substantial evidence that Petitioner was ineligible for asylum because he had assisted in the persecution of others. Also contrary to Respondent's arguments, the Ninth Circuit's decision in this case is in conflict with its prior decisions and is also in conflict with opinions in other circuits. Further, and also contrary to the Respondent's arguments, the Ninth Circuit Court of Appeals erred in ruling on Petitioner's appeal because it did not have jurisdiction where neither the Immigration Judge nor the Board of Immigration Appeals issued a final order of removal. The Court should therefore grant review in this case.

1. In his opposition, Respondent argues that Petitioner's own testimony provided substantial evidence to support the finding of the Immigration Judge ("IJ") that "although [Petitioner] never directly participated in the torture of detainees, he did arrest people, knowing they might be tortured." Respondent's Brief in Opposition ("Opp.") 8 (citing Petition Appendix ("Pet. App.") 16).

Although Respondent accurately summarizes the IJ's finding, Respondent failed to address the essence of Petitioner's argument – that the panel erred when it held that substantial evidence supported this finding, as there is *no evidence in the record* that Petitioner arrested individuals *knowing* that they

may be tortured by other police officers, whereas there is evidence in the record that Petitioner spoke out against the torture he later learned of and ultimately resigned because of it. *See* Pet. 19-25.

There is no dispute that an IJ's factual findings are reviewed for substantial evidence. *See Zehatye v. Gonzalez*, 453 F.3d 1182, 1184-1185 (9th Cir. 2006). In reviewing the agency's factual findings under this standard, the appellate court must find that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). Thus, the appellate court must "uphold the IJ's determination if it is supported by reasonable, substantial, and probative evidence in the record." *Zehatye*, 453 F.3d at 1185 (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992)). In the present case, the record lacks "reasonable, substantial, and probative evidence" that Petitioner arrested individuals knowing they would be tortured. However, in his brief in opposition to the petition, rather than analyzing the record that was before the IJ, Respondent simply quoted from the IJ's decision, which misstated the evidence Petitioner presented regarding his role in the persecution that occurred within the Guatemalan police force. Opp. 8.

In this case, the first time Petitioner was required to be on patrolling duty, when he was assigned to the Fourth District of police, he was wholly unaware that those who were arrested were

later tortured. Administrative Record ("A.R.") at 206-207. Rather, it was not until years later when he was assigned to work at the office taking reports of detainees who had been arrested and tortured, that he discovered that people who were arrested were later tortured. *Id.* Although Petitioner testified that, after learning about the torture practices of the Guatemalan police, he would "rarely" be sent to work at roadblocks and inspection points, he *never* testified that he personally made any arrests on these assignments. *See* A.R. at 212-213. In fact, the record shows that Petitioner, who for many years had no idea that the police force engaged in torture, complained to his superiors once he realized that individuals who were arrested by police were later tortured, and that Petitioner ultimately resigned because he disagreed with the practices of the police and believed them to be illegal. A.R. at 184-187, 206-207. Thus, Respondent is incorrect in asserting that Petitioner's own testimony provided substantial evidence to support the IJ's finding that Petitioner arrested people knowing they might be tortured.

2. Respondent further argues that, because the IJ did not base her conclusion that Petitioner assisted in the persecution of others on his role in typing statements from arrestees, this case does not present the question of whether Petitioner's taking statements of individuals after they were mistreated falls squarely outside a line established by Ninth Circuit precedent. Opp. 8. However, in finding that substantial evidence supported the IJ's determination that

Petitioner assisted in the persecution of others on account of their political opinion, the court of appeals included that Petitioner "recorded statements from detainees who had been tortured, and whose statements were given as a result of this torture." Pet. App. 4. Thus, such acts were considered in the decision below in reaching the conclusion that substantial evidence supported the IJ's decision. Moreover, contrary to Respondent's assertions, Petitioner is not arguing that the fact that he recorded statements from mistreated detainees was the only act he committed that led to the Ninth Circuit's conclusion that substantial evidence supported a finding that he assisted in the persecution of others. Rather, Petitioner argues that *both* his role as a patrolling officer *and* his primary role of recording statements of detainees fall squarely outside the "margin of culpability" established by Ninth Circuit precedent in *Miranda Alvarado v. Gonzales*, 449 F.3d 915 (9th Cir. 2005).

3. Respondent argues that this Court's review would not be warranted to resolve a conflict among Ninth Circuit decisions especially given that the Ninth Circuit decision at issue here is unpublished and thus non-precedential. Opp. 9 (citing to 9th Cir. R. 36-3(a)).

Respondent's assertion is without merit, as the considerations governing review on certiorari do not distinguish between published and unpublished decisions. Sup. Ct. R. 10. Further, and important to

note, the Ninth Circuit permits citation to unpublished opinions:

> A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been; (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and (ii) issued on or after January 1, 2007.

9th Cir. R. 32.1(a). In light of the above rule allowing citation to unpublished and non-precedential decision in the Ninth Circuit, it is highly important that even unpublished and non-precedential decisions be consistent with other decisions of the circuit, as all decisions issued by the court can be cited.

Respondent cites to this Court's decision in *Wisniewski v. United States*, 353 U.S. 901 (1957), in an attempt to further support his argument that this Court's review would not be warranted to resolve a conflict within the Ninth Circuit. However, *Wisniewski* is inapplicable to the instant case. First, *Wisniewski* was before this Court *on certification by* the Eighth Circuit Court of Appeals, where the Eight Circuit, rather than issuing a decision in the case, sought guidance from the Supreme Court on how to resolve the issue in question. *Wisniewski*, 353 U.S. at 901. Here, the Ninth Circuit has issued a decision in Petitioner's case which is at odds with its decision in *Miranda Alvarado, supra*. Such conflict is one of the bases on which Petitioner seeks review from this Court. Thus, Petitioner's scenario is entirely different

from that in *Wisniewski*, where the court of appeals never issued a decision in the case. Further, the instant case is not only about conflicts *within* a circuit court of appeals, but is also about conflicts *among* circuit courts of appeal, as discussed in more detail below. Thus, Respondent's reliance on *Wisniewski* is misplaced.

4. Respondent argues that "Petitioner does not contend there is any difference in the legal standards applied by the circuits" in applying the continuum of conduct test set forth in *Fedorenko v. United States*, 449 U.S. 490 (1981)[1] but rather, simply cites a number of circuit decisions which naturally reach different bottom-line results to disparate factual situations. Opp. 10-11.

While Petitioner does not dispute that the decisions cited in his petition deal with varying sets of facts, contrary to Respondent's assertion, Petitioner is, in fact, arguing that the circuits are interpreting *Fedorenko* differently in issuing such decisions and,

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[1] In determining whether the persecutor bar applies, individual accountability must be established. *Miranda Alvarado*, 449 F.3d at 926. To determine personal culpability, the Court must evaluate the applicant's actions against the continuum of conduct between "[a]n individual who did no more than cut the hair of female inmates before they were executed" and a guard who admitted to shooting at escaping inmates. *Id.* at 925-26 (quoting *Fedorenko v. United States*, 449 U.S. at 512 n.34). In determining where one's actions lie on this continuum, the adjudicator must "examin[e] the degree of relation his acts had to the persecution." *Id.*

therefore, applying different legal standards to the persecution of others bar.

In interpreting the *Fedorenko* continuum, the Ninth Circuit concluded in *Miranda Alvarado* that the petitioner, who interpreted during the interrogation and torture of Shining Path members, assisted in the persecution of others. *Miranda Alvarado*, 449 F.3d at 929-930. In assessing where the petitioner's actions fell on the *Fedorenko* continuum, the Court concluded that he had performed "an integral role in facilitating the persecution." *Id.* at 928. The Court found his assistance to be material because "[w]ithout the translation, there would have been no reason for the torture to occur as it did, as its point was to elicit information." *Id.* Because his acts as an interpreter furthered the persecution, the Court found that he had assisted in the persecution of others. *Id.* at 929. Significantly, the Court held that Miranda Alvarado's case was "perhaps at the margin of culpability required under the statute." *Id.*

As *Miranda Alvarado* stands at the margin of culpability, the present case falls squarely outside, as Petitioner's actions were not integral to or in furtherance of persecution. Petitioner's argument therefore remains that when looking at the *Fedorenko* continuum test, its application to varying sets of facts, and the disparate outcomes among the circuit courts, the test is *not* applied consistently.

To highlight the circuit courts' inconsistent application of the *Fedorenko* continuum test, the

outcomes in *Doe v. Gonzalez*, 484 F.3d 445 (7th Cir. 2007) and *Hernandez v. Rio*, 258 F.3d 806 (8th Cir. 2001), when compared to the outcome in Petitioner's case, are particularly illustrative. In *Doe*, the Seventh Circuit found that "the question of whether Doe 'assisted' or otherwise 'participated' in the persecution of the Jesuits who were killed is a close question." *Doe*, 484 F.3d at 448. In that case, Doe was a former lieutenant in El Salvador's army who, in 1989, expressed misgivings but complied with an order to accompany the Atlacatl Battalion in its mission to kill a Jesuit university president and who, after the mission resulted in the murder of six Jesuits, returned to the base and assisted in destroying log books identifying the soldiers who had participated in the raid. *See id.* at 446, 448.

Although the facts clearly demonstrate that Doe accompanied the Atlacatl Battalion with the specific purpose of killing the Jesuit university president and then later destroyed evidence of the killings, the Court found that Doe's mere presence did not seem like assistance in the persecution. *Id.* at 446, 448. To support its conclusion, the Court, citing to the *Fedorenko* continuum test, stated,

> Doe's case is closer to that of "an individual who did no more than cut the hair of female inmates before they were executed," which the Supreme Court said in *Fedorenko* "cannot be found to have assisted in the persecution of civilians," 449 U.S. at 514 n. 34, 101 S.Ct. 737. Or to that of the petitioner in *Hernandez*

> *v. Reno*, 258 F.3d 806 (8th Cir.2001), who, forced to be a member of a firing squad, fired to one side of the target, and was held not to have assisted in persecution.

Doe, 484 F.3d at 448.

The Eighth Circuit Court of Appeal's decision in *Hernandez* further illustrates the circuits' inconsistent approach in interpreting the *Fedorenko* continuum of conduct test and demonstrates the difficulty decision makers have in applying the test. In contrast to the instant case, in *Hernandez*, the Eighth Circuit reversed the Board's determination that an alien's behavior (where the alien followed orders to remove Guatemalan villagers from their homes, herded them to the town center, and participated in a firing squad by firing to the side of those who were identified as informants and were ultimately killed) was "'adequate to indicate' that he had assisted in persecution." *Hernandez*, 258 F.3d 806, 809, 814-815.

Thus, the application of the *Fedorenko* continuum test by both the Seventh Circuit in *Doe* and the Eighth Circuit in *Hernandez* is in stark contrast to the Ninth Circuit's application of the test in the instant case, where Petitioner's primary duties with the Guatemalan police involved typing reports and, for a short time, before knowing of the torture detainees suffered, making arrests. Petitioner's comparison of the above cited cases to that of his own is not a simple gesture of citing cases with different

facts and different outcomes. Rather, the analysis of the facts in the above mentioned cases, as well as the other cited cases in the petition, presents a question of whether the circuits are applying the legal standard – the continuum of conduct test – consistently.

5. Respondent argues that because Petitioner failed to argue in his merits brief that the Ninth Circuit lacked jurisdiction over the petition for review due to the agency's failure to issue a removal order, this Court should not address it in the first instance. Opp. 11. However, this Court would not be addressing the issue in the first instance, as Petitioner did raise this argument in his petition for rehearing before the Ninth Circuit. Further, Respondent's argument is without merit. Despite the parties' failure to raise this argument in their briefing on the petition for review, the issue of jurisdiction is properly before the Court because issues of subject matter jurisdiction may never be waived. *See Olivera-Garcia v. INS*, 328 F.3d 1083, 1086 (9th Cir. 2003).

In further claiming that Petitioner's jurisdiction argument fails, Respondent contends that there is, in fact, a final order of removal in the case. Opp. 11. Respondent supports this assertion by relying on *Lolong v. Gonzales*, 484 F.3d 1173 (9th Cir. 2007).

However, Petitioner's case is distinguishable from the Ninth Circuit's *en banc* decision in *Lolong* and, therefore, the decision in that case is not controlling here. In *Lolong*, the Court found that it had jurisdiction to consider the petition for review.

Lolong, 484 F.3d at 1178. In that case, Lolong conceded removability before the IJ and, as a result, the IJ held that Lolong was removable as charged. *Id.* at 1174. However, the IJ *granted* Lolong's application for asylum and, therefore, did not order Lolong removed. *Id.* The government thereafter appealed the IJ's grant of asylum, and the BIA granted the appeal, reversed the decision of the IJ, and granted Lolong's application for voluntary departure. *Id.* The court concluded that, although the IJ did not specifically order the petitioner removed, it nevertheless had jurisdiction over the petition for review. It found that where the Board overturns an IJ's grant of relief, the Board is not ordering removal in the first instance; rather it is simply reinstating the order of removal that has already been entered by the IJ and that would have taken effect but for the IJ's subsequent cancellation of removal. *Id.* at 1177.

While, as Respondent points out, in Petitioner's case the IJ designated Guatemala as the country of removal and found that Petitioner's removability had been established by clear and convincing evidence (Opp. 11), Petitioner's case is distinguishable from the facts in *Lolong*. Whereas the Board in *Lolong* expressly reinstated the IJ's prior finding of removability and thereafter overturned the IJ's decision granting petitioner's application for relief, the Board in the present case only affirmed the IJ's order denying relief. *Lolong*, 484 F.3d at 1177; Pet. App. 5. However, despite the IJ's decision denying all applications for relief, she failed to enter an order of

removal. Pet. App. 18. Thus, unlike in *Lolong*, the Board's decision in the present case, which simply affirmed without opinion the IJ's order, is insufficient to remedy the IJ's error in failing to enter an order of removal after denying Petitioner's applications.

Accordingly, in this case, the Ninth Circuit lacked jurisdiction to hear the merits of Petitioner's claim because the agency never issued an order of removal. Therefore, the Ninth Circuit erred in denying the petition for rehearing, and should have vacated its prior decision and remanded Petitioner's case to the agency for further proceedings. Thus, Petitioner respectfully requests that this Court grant certiorari in Petitioner's case and reverse the decision of the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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